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ABSTRACT

In this policy analysis of affirmative action, four Asian Pacific American law professors make a case for affirmative action with a special focus on Asian Pacific Americans (APAs). It is asserted that affirmative action produces many benefits, such as reducing the harm of racism, promoting equal opportunity, and advancing racial justice. However, many of the costs of affirmative action have been misconceived or exaggerated. Part I introduces the affirmative action controversy and the urgent need for APAs to become involved in the public policy debate. Part II presents general arguments for affirmative action, stating the case for race-conscious social remedies and countering the arguments of meritocracy and color-blindness. Part II focuses specifically on APAs and their history of suffering discrimination and their accomplishments with and without affirmative action. Section D of Part II discusses college admissions, an area of special concern for APAs. Part IV explains how APAs have an opportunity to defend affirmative action in a way that challenges both conservative and liberal stereotypes. (SLD)

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BEYOND SELF-INTEREST:

ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE

A Policy Analysis of Affirmative Action

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ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE

A Policy Analysis of Affirmative Action

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Executive Summary

[1] In this policy analysis of affirmative action, four Asian Pacific American law professors make the case for affirmative action, with a special focus on Asian Pacific Americans ("APAs"). The authors believe that affirmative action produces many benefits, such as reducing the harm of racism, promoting equal opportunity, and advancing racial justice. While affirmative action has costs, many of them are misconceived or exaggerated. Those genuine costs that do exist are ones that *all* Americans should bear in order to move America toward a more just society.

[2] This document has two target audiences. The first audience consists of APAs, whether activists, political leaders, academics, ethnic media, or interested members of the community. Like all Americans, APAs are trying to understand the frequently frustrating and always pitched debate over affirmative action and civil rights. In this analysis, the authors tackle the genuine complexity confronting APAs and explain why support for affirmative action may mark a defining moment for APA identity.

[3] The second audience consists of the general public. In this regard, the authors want to present APA perspectives on affirmative action. Recently, APAs have become increasingly visible in the political sphere and perhaps nowhere as prominently as in the debate over affirmative action. But this visibility has been passive, with APAs being used to make debating points, especially by opponents of affirmative action. This policy analysis strives to convert that passive visibility into active participation. By adding distinct APA voices to the policy debate, we hope to address better the complexities of race relations and, in turn, strengthen the arguments for affirmative action.

[4] We begin in Part I with a brief introduction to the current affirmative action conflict and the urgent need for APA involvement in the public policy debate.

[5] Part II presents the general arguments for affirmative action. Section A states the case for race-conscious remedies in a society afflicted with racial discrimination. Sections B and C respond to two standard counter-arguments, that affirmative action violates the abstract principles of meritocracy and color-blindness.

[6] Part III focuses specifically on APAs, their history of racial discrimination and their relationship to affirmative action. Section A documents the history of explicit institutional racism against APAs that, until recently, remained both law and practice. Section B examines the model minority myth of APAs and exposes its inaccuracies and dangers. Section C details the current discrimination against APAs, which persists despite perceptions of utter assimilation and success. Finally, Section D addresses college admissions, an area of special concern for APA communities. In particular, it refutes the claim that affirmative action for African Americans, Latina/os, and Native Americans means that APAs must be capped by admission ceilings.

[7] Part IV provides concluding thoughts and explains how APAs have a unique opportunity to defend affirmative action in a way that challenges both conservative cries of the APA "victim" and liberal neglect of APA communities. How APAs react to the onslaught against affirmative action presents a defining moment for APA history and identity. By standing up for affirmative action—regardless of whether APAs are always included—we can show loyalty to principles, not self-interest, and a genuine commitment to a community of justice.

I. INTRODUCTION

[1] Affirmative action is under severe attack.[1] In California, the Regents of the University of California voted to end affirmative action in admissions, employment, and contracting.[2] In November 1996, the so-called "California Civil Rights Initiative" (Proposition 209) would do the same for the entire state.[3] On the federal level, various bills are circulating in Congress to end affirmative action as we know it.[4]

[2] The fate of Asian Pacific Americans ("APAs") has become central to this attack. Opponents insist that they object to affirmative action because it is unfair. They highlight how preferential treatment of others may disadvantage APAs, a racial minority. In doing so, they claim the moral high ground: They seek to protect not only the rights of White males, but also APAs. A provocative argument, this warrants reflection and analysis.

Asian Pacific Americans must stand up for affirmative action, whether or not we are directly included in such programs.

[3] Any thoughtful inquiry must begin with the historical experience and contemporary status of APAs. The exclusion of Asian immigrants from the United States and the segregation of APAs from mainstream society have meant that many Americans know little about APAs. As lamentably, because many (though not all) APAs are immigrants and because history is not always taught well in our public schools, many APAs know little about the sorry history of U.S. race relations. What we need, therefore, is education, discussion, and deliberation.[5]

[4] To help meet this need, four APA law professors—Gabriel Chin of Western New England, Sumi Cho of DePaul, Jerry Kang of UCLA, and Frank Wu of Howard[6]—gathered in Los Angeles in May 1996 to begin a serious discussion of affirmative action. Representing diverse ethnic backgrounds, political viewpoints, and scholarly methods, we struggled with the many troubling issues raised by racial discrimination and its remedy.

[5] In particular, we were concerned about how opponents of affirmative action have framed the debate—in terms of "quotas," "reverse discrimination," and the "APA victim." We were also dissatisfied with the dearth of serious public policy analysis from APA perspectives. APAs are one of the fastest growing racial groups in the country, with more than nine million individuals constituting approximately three percent of the population. Introducing them into the affir-

mative action debate not only recognizes this presence but also illuminates the complex nature of racial discrimination from new viewpoints.

[6] APAs have come to occupy a unique place in the post-civil rights era. We have experienced racial discrimination, yet we also have enjoyed some upward mobility. We are racial minorities, yet we are also the "model" minority, portrayed at times as "honorary Whites." Placed in this unique position, many APAs are understandably confused about affirmative action. For the reasons explained in the following pages, each author has concluded that APAs must stand up for affirmative action, whether or not we are directly included in such programs. Each of us also believes that APAs can play an invaluable role in society's progress toward a community of justice that transcends self-interest. This is our case.

II. AFFIRMATIVE ACTION: THE GENERAL DEBATE

II.A. The Case for Affirmative Action

II.A.1. Affirmative Action Remedies Racial Discrimination

[1] White Supremacy stands for the proposition that people of color are somehow different and inferior; therefore, they do not belong as equals in the cultural, social, and political company of Whites.[7] This belief, unfortunately ingrained in American history, has had enormous consequences for all people of color. White Supremacy as a latent belief is widespread; as an explicit ideology, it is re-emerging in separatist militia groups as well as on the *New York Times* bestseller lists.[8]

[2] A track race metaphor, invoked by the late President Lyndon Johnson in his historic affirmative action address, provides insight into racism's harm. Living in an unabashedly racist society meant that many of our parents, grandparents, and great-grandparents were not allowed to run a fair race. Racism raised high hurdles making it impossible for otherwise "equal" runners to compete. Thus, when they passed the baton to the next generation, they did so running with less speed, having covered a shorter distance, and having less stamina than they would have had in a non-racist society.

[3] Accordingly, for many people of color, racism has decreased the amount and value of economic, social, and cultural capital inherited from our ancestors. Not only did we receive less material wealth, we also received less "insider knowledge" and fewer social contacts so instrumental to one's educational and professional advancement. The fact that runners today might compete on more equal "footing" does nothing to change this fact.

[4] As one concrete example, consider the legacy of racial discrimination by the Federal Housing Administration ("FHA"). The 1934 Federal Housing Act made purchases of homes possible for millions of Americans. But the FHA was not colorblind. It believed that non-White families would decrease property values in White neighborhoods[9] and thus "channeled almost all of the loan money toward whites and away from communities of color."[10] As such, between 1946 and 1959, less than 2 percent of all houses financed with FHA backing were purchased by African Americans.[11] This not only cemented racial segregation, it also ensured that Whites would be disproportionately advantaged by post-war suburban home ownership, "one of the most successful generators of wealth in American history."[12]

[5] This sort of unfairness, compounded generation after generation, has left racial minority groups with less wealth, fewer social services, and cultural resources than they would have had otherwise.[13] And as President Johnson put it: "You do not take a person hobbled by chains and liberate him, bring him up to the

starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."[14]

[6] Racism coursing through the generations has also carved derogatory stereotypes into the bedrock of American culture. While different for each race and fluid over time and locale, these stereotypes have variously portrayed us as stupid, lazy, ineloquent; uncouth, violent, bestial; immoral, evil, irredeemable; dishonest, unfair, sneaky.[15] Although most Americans publicly reject these racist generalizations, none of us, whatever our race, can claim complete immunity to stereotypical thinking.[16] Furthermore, prejudice can work its way into social institutions and cultural practices in ways difficult to notice, much less root out. It should therefore come as no surprise to find discrimination—from the most virulent antipathy, to willful ignorance, to selective indifference—in all walks of life.

> "You do not take a person hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others'."
>
> Lyndon B. Johnson

[7] In a startling example, ABC's "PrimeTime Live" news magazine recently used two professionally trained "testers"—one Black, one White—to see whether "equality of opportunity" exists. The two men, trained to be identical in all relevant aspects save race, exposed a disturbing pattern of racism throughout their two-week experiment. While the White man was greeted warmly and encouraged at an employment agency, the African American tester was lectured on laziness and drug use. In a record store, the White tester was left alone to browse while the Black man was tailed by an employee fearful of shoplifting. An apartment building manager gave the White tester keys to a rental while the African American tester was told by the same manager that all apartments had already been rented.[17]

[8] One might suppose that anti-discrimination laws, passed during the Civil Rights Era, would have put an end to all this racism. But they have not, in part because these laws are especially difficult to enforce: A "smoking gun" is rarely found because naked prejudice is kept safely hidden. Also, anti-discrimination laws require victims of racial discrimination to face protracted litigation, using personal and societal resources, to reach only uncertain end.

[9] Instead of resigning ourselves to under-enforcement of anti-discrimination laws, we can support affirmative action. By "affirmative action," we refer to a broad array of race-, ethnicity-, and gender-conscious programs, enacted by the government and private sector, voluntarily or by court order, to promote equality of opportunity and racial diversity. It includes outreach programs, targeted at specific groups, to notify them of employment, education, and contracting opportunities. It also includes programs that favor—among similar candidates who satisfy necessary qualifications—members of historically underrepresented

groups. These programs act as a small counterweight to the various discriminations—sometimes purposeful, sometimes negligent—that people of color face daily, throughout their lives. They provide a rough and meager remedy for the felt impact of such unfair treatment, which for some reach back for generations.

[10] Those who believe that the recompense is too large should ask themselves these questions. First, even if you are individually innocent of any racial discrimination, do you still enjoy its illicit fruits? After all, discrimination (by others) has shrunk your pool of competitors for admissions, public contracting, and jobs.[18] Second, for White Americans,[19] would you, if given the chance, voluntarily give up Whiteness, become a person of color, accept all the injustices associated therewith, in exchange for the chance to participate in the piecemeal remedy of affirmative action programs? One might put the same question to APAs. Would you accept the racism faced by Americans who are Black, Latina/o, or Native American, in exchange for affirmative action programs meant for their benefit?

II.A.2. Affirmative Action Creates a Better America

[1] Besides counteracting racism, affirmative action moves us toward a more just society that benefits all Americans. It does so by increasing social interaction among people of different races, cultures, and backgrounds. Increased contact in the school and workplace, among diverse people interacting with basic respect and common goals, is essential, especially in a world where "hypersegregation"[20] persists.

[2] For instance, consider how affirmative action operates in the university. Affirmative action allows students of different races and backgrounds to rub shoulders, share meals, debate issues in an open-minded, intellectual community where learning takes place not only within the lecture hall, but without, not only from books, but from classmates. It "allows for social interaction in an otherwise [racially] segregated world, which in turn allows us to break down our misconceptions and prejudices."[21] To be sure, there are campuses where students feel comfortable sticking only to their own "kind." And without question, more could be done to encourage personal interaction across various social cliques. But the mere fact that more could be done in no way denies the tangible benefits already produced by affirmative action.

[3] Affirmative action also moderates outdated stereotypes by helping racial minorities achieve non-stereotypical positions of leadership and status.[22] Seeing people of color in such unexpected positions—an APA as law professor, not engineer—jars all of us, regardless of race, out of old habits of thought and expectation.

[4] Besides decreasing racial stereotypes, affirmative action produces other benefits. In the classroom, it increases the variety of life experiences, which in turn enlivens discussion and deepens analysis. This assertion is not based on any simplistic assumptions that all minorities do think or should think alike. Rather, as explained by Assistant Attorney General Walter Dellinger, it is based on the "common sense proposition that in the aggregate, increasing the diversity of the student body is bound to make a difference in the array of perspectives communicated at a university."[23] The same is true for faculty. Race continues to matter in real life, especially for racial minorities, and it is this experience

that teaches valuable lessons about race, racism, and race relations in contemporary America.[24]

[5] Affirmative action also produces benefits outside of educational settings. In today's workplace, racially diverse co-workers chat at the water cooler. Earlier, they did not. Even if they are squabbling with each other, they are at least talking to each other, face to face. Informal interactions like this, perfectly harmonious or not, enable us to see each other as fellow human beings, with common fears, faults, and aspirations.

A society plagued by tremendous distributive inequities along racial lines is not only unjust, but unstable.

[6] Affirmative action not only improves workplaces by furthering interaction and understanding, it also improves the work product or quality of services. Consider the value of a diversified police force. In the ideal world, the racial diversity of a law enforcement agency would have no bearing on maintaining peace and public safety. But in the real world, especially when the relationship between police and the community they serve is adversarial, racially diversifying the ranks may bolster law enforcement's effectiveness.

[7] Some argue that such diversification caters to racist preferences. Crediting community preferences for a diversified police force is no different, they insist, from a restaurant refusing to hire an African American hostess because the clientele would prefer being greeted by a White person. This argument fundamentally mistakes racism. In particular, it ignores morally significant differences in the origin and social meaning of these preferences.

[8] Inner-city communities, with a lengthy history of police abuse, might prefer a police force more reflective of the community's racial make-up because such a force, on the whole, will be less likely to wield its power in racist ways. Moreover, the social meaning of an integrated police force is not that Whites are members of a degraded caste, unworthy of equal treatment. By contrast, the preference for a White restaurant hostess arises from less noble or reasonable origins and, more importantly, broadcasts to racial minorities the clear message that they are less than equal.[25] It is downright bizarre to think that we, as a society, lack the common sense to distinguish between such polar opposites.

[9] Finally, affirmative action is a good investment in a stable future. A society plagued by tremendous distributive inequities along racial lines is not only unjust, but unstable. Consider pre-apartheid South Africa, or more close to home, the Los Angeles riots of 1992, which erupted in the context of epidemic unemployment and social despair.[26] Affirmative action helps alleviate some of this distributive imbalance.

[10] Admittedly, it does not do so by directly reaching those racial minorities at the lowest rungs of society. Ideally, this is a task for aggressive anti-poverty programs or possibly complementary class-based preferences. Still, race-based affirmative action helps ameliorate this imbalance by advancing the prospects of

minority students, workers, and entrepreneurs. In turn, they function as role models,[27] increasing the self-esteem of individuals who identify with them, and contributing valuable economic and cultural resources back to their communities. Seeing a steady stream of individuals who "make it," notwithstanding their race, keeps hope alive that any American may achieve success. Affirmative action is an effort to translate this hope into reality and not to abandon it as a "dream deferred."

II.A.3. The Costs of Affirmative Action Are Acceptable

[1] We concede that there are costs, at times painful ones, to affirmative action. For instance, some marginal candidates will lose out to those helped by affirmative action. And this might seem particularly unfair, especially if the person who loses out feels no responsibility for racism, past or present. But as Professor Stanley Fish argues:

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[2] *[I]f today's white males do not deserve the (statistically negligible) disadvantages they suffer, neither do they deserve to be the beneficiaries of the sufferings inflicted for generations on others; they didn't earn the privileges they now enjoy by birth, and any unfairness they experience is less than the unfairness that smoothes their life path irrespective of their merit.*[28]

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[3] Also, other candidates who would have lost out even without affirmative action will find it easier to blame "reverse discrimination" than themselves. For instance, consider the story of Tom Wood, co-author of the so-called "California Civil Rights Initiative," which would terminate race-conscious remedies in the State of California. He has repeatedly asserted being the victim of "reverse discrimination" when, allegedly, a woman of color took the teaching job he deserved.[29] When pressed for details so that the story could be verified, Wood steadfastly declined.

[4] An NBC "Dateline" investigation, however, turned up the following facts. First, "Tom Wood hadn't published anything until 15 years after he received his Ph.D."[30] Second, "in the 20 years since that Ph.D., Wood ha[d] held only two university teaching positions, each one-year appointments."[31] Third, of the five teaching positions Wood could have applied for, four were filled by White males and one to a "woman who was, by almost any standard, more qualified for the position than Tom Wood."[32]

[5] In other words, affirmative action allows the scapegoating of minorities. It also allows well-intentioned employers who want to break bad news gently to identify affirmative action as the culprit instead of the candidate's own lackluster qualifications. This "racial fall guy," in turn, fuels White resentment and marks successful racial minorities as successful only because of affirmative action.

[6] Finally, there are concerns that affirmative action will simply be inefficient. The fear is that we will not have the best qualified performing society's tasks, and thus, we will lose productivity and face higher labor costs. But this fear assumes that people of color and women benefiting from affirmative action are

less qualified and that the definition of "best qualified" is incontestable. But are these assumptions correct? We answer that question next.

II.B. The Merit Critique Is Muddy

[1] Critics of affirmative action charge that taking race into account compromises our commitment to merit. Obviously, some measures of merit are relevant; however, critics are mistaken when they assert that merit is simple to understand and apply. They are also off the mark when they contend that racial diversity and merit cannot co-exist.

II.B.1. Merit Comes in Many Forms

[1] A catchy buzzword, merit is more easily invoked than defined. Without attempting an authoritative definition, we can start with the definition of merit as "the ability to contribute to the achievement of valid institutional goals."[33] Immediately, we see that no conception of merit is universal because different institutions will have different goals. For example, the Olympic Ski Team would certainly define merit differently than would, say, the Foreign Service of the State Department, although both organizations seek excellence.

[2] Diverse ideas of merit exist even in more similar institutions. For example, a law school like Stanford, seeking a national student body, would define merit differently in some ways than would, say, the University of Montana, which might aim to build the state bar by recruiting in-state students likely to stay in Montana. And though both are state-sponsored schools, CUNY's (City University of New York) focus on public interest law might make it value different qualities in prospective students than the University of Montana, though both want to produce excellent lawyers. In sum, the very notion of merit turns fundamentally on the goals and purposes of a particular institution.

II.B.2. Merit in the University

[1] Many opponents of affirmative action have framed the debate as "affirmative action" versus "merit." They argue that affirmative action necessarily undermines merit, thereby harming all social institutions, particularly our colleges and universities. We find this argument simplistic.

II.B.2.a) Academic Standards Have Risen During the Affirmative Action Era

[1] In fact, the advent of affirmative action has occurred simultaneously with an impressive rise in academic standards at elite universities. As Chancellor Chang-Lin Tien has explained: "The numbers dispel the notion that diversity has somehow sacrificed the quality of [Berkeley]. In fact, the diversity has been coupled with rising standards."[34] Admissions officials across the nation, from Berkeley to Harvard, agree.[35]

[2] The social forces that have improved the quality of the student body parallel those underlying affirmative action—the long-term pressure in higher education to open its doors to groups formerly excluded, such as racial minorities and women. Around World War II, universities began to make token exceptions to their admission policies, which had until then restricted the pool of potential students to the well-heeled, well-bred graduates of particular preparatory schools, and those of the "right" race, religion, and gender.[36]

[3] Significant gains in women and minority admissions did not occur until the 1960s, however, and only in the wake of intense pressure from the Civil Rights Movement. Affirmative action was reluctantly accepted by elite schools such as Harvard as the "bitter pill" necessary to stave off social upheaval and political instability. Prior to this time, Harvard University had excluded qualified women and racial minorities for 328 of its 358 year existence.[37] This preference for White Protestant men hardly served the lofty goals of "merit," but rather sustained mediocrity for the privileged. Individual merit became a central concern when the qualifications of the "privileged" began to be questioned.[38]

In fact, the advent of affirmative action has occurred simultaneously with an impressive rise in academic standards at elite universities.

II.B.2.b) Measuring Academic Ability Is Hard

[1] Affirmative action supposedly compromises merit because it admits students of color based on factors other than grade point average ("GPA") and standardized test scores. Schools rely on numerical criteria as one set of factors in admissions because they are somewhat helpful, though by no means perfect, in predicting future academic performance.[39]

[2] But for any particular individual, test scores may be quite misleading. Indeed, because schools weight GPAs and test scores and use scales of comparison for preparatory institution and course work, APAs can easily be disadvantaged by the manipulation of seemingly neutral factors. APAs, for example, would be disadvantaged if a university gave greater weight to the verbal portion of the SAT exam or no credit for non-European foreign language skills. Since universities have historically done exactly this to APAs, we should be skeptical about claims that academic merit is a scientifically measurable characteristic that can be gauged objectively.

II.B.2.c) Grades and Test Scores Are Not Everything

[1] More importantly, no sensible admissions officer would pretend that grades and scores are the only components of merit. Reducing an individual's accomplishments and potential to a number would compel schools to ignore, say, demonstrated leadership, scholarly publications, motivation, maturity, and the use to which an education will be put, including service to neglected communities. In short, many qualifications not reflected by standardized test scores or grades may indicate that a person would be a valued member of a school community and a successful graduate.

[2] Indeed, many professional school faculty will concede that doing well in school does not ensure doing well in the profession. There are countless stories of "C-" students from non-elite law schools becoming world-renowned attorneys. Conversely, there are countless "A" law students who fail miserably in the day-

to-day practice of law. Recognizing this less simplistic view of merit benefits not only people of color, but everyone who can contribute to one of the school's or the profession's various goals.

[3] Furthermore, a school might reasonably adopt an affirmative action plan based on the conclusion that, in some circumstances, race can be a component of merit. Many schools, for example, admit students whom they hope will become civic and community leaders. For better or worse, these communities are sometimes racially defined. A school wholly blind to race, however, would be unable to consider the fact that certain applicants may become political, spiritual, and artistic leaders of such communities. Not only would such a school be deprived of having such a person as an alumna, but that applicant would have been treated unfairly. Refusing to consider the potential suggested by an applicant's leadership skills and background would foreclose full evaluation of her merit.

[4] While many concede the force of this argument, they still feel uneasy about considering race as a part of merit. After all, race is not something one "earns." But remember, schools routinely look at characteristics that do not arise from individual initiative. Applicants blessed with extraordinary athletic or artistic abilities receive special consideration even when these abilities arise more from natural talents than individual toil. Applicants with novel backgrounds —such as being raised on military bases or diplomatic missions around the globe—may properly be favored regardless of whether those applicants had any say in the matter of where they lived and grew up. Accordingly, people should feel more at ease with expanding the notion of merit to include, at times, membership in a distinct social group.[40]

> [R]educing racial prejudice, increasing racial harmony, and avoiding the resegregation of higher education . . . are more weighty than many other ends for which the usual merit principle is sacrificed.

II.B.3. Our Commitment to "Merit" Is Fickle

[1] Finally, note how those ardently committed to an unreflective merit principle ("merit equals objective test scores and grades") ignore curious exceptions without outcry. Admissions committees, for example, will take into account an applicant's "legacy" status—having an alumni relative—even though that fact is irrelevant to personal achievement or academic promise.[41] While having rich or politically powerful parents hardly makes an applicant smarter, a person in that fortunate position can often expect preferential treatment of his admissions application.[42]

[2] This is not the case solely at elite private schools, such as Harvard, to which more students were admitted one year under the legacy preference than the total number of African Americans, Mexican Americans, Puerto Ricans, and Native Americans in the entire class.[43] It is also the practice of our public institutions. For example, the University of California's lobbyist in Sacramento helped

children of the powerful:[44] Both UCLA[45] and Berkeley[46] had secret but established "back channels" to aid privileged applicants.

[3] But the exceptions do not end there. Consider nepotism—preferential treatment on the basis of a biological happenstance—which is perfectly legal in private-sector hiring. Or what about the substantial numerical boosts granted to the scores of veterans on civil service exams, regardless of whether they actually participated in combat, suffered emotional or physical injury, or are socially or economically disadvantaged?[47] These exceptions should make us question our commitment to some unexamined merit principle.

[4] In sum, the choice is not between "merit" and "affirmative action." More accurately, the choice is between different conceptions of merit or between competing visions of an institution. If taking race into account seems to compromise accustomed notions of merit, we must recognize that the ends achieved—reducing racial prejudice, increasing racial harmony, and avoiding the resegregation of higher education—are more weighty than many other ends for which the usual merit principle is sacrificed. We must also acknowledge that "conventional" notions of merit may simply mismeasure merit for universities that have less self-interested and more social-minded goals than simply mass-producing the most test-savvy and clever graduates.

II.C. Race-Consciousness Is Not Racism

II.C.1. Color-Blindness Is Not Morally Mandated

[1] In opposing affirmative action, many Americans appeal not only to an abstract merit principle, but also to a rigid color-blindness principle. They simply feel that race is morally irrelevant and should never be used in any way. To this appeal, we ask: Why precisely is race-consciousness so taboo?

[2] Surely, in the past, race-consciousness was used to perpetuate an unjust caste system, such as slavery. But that has not always been the intent, effect, and meaning of race-conscious programs. For instance, after the Civil War, Congress established the Freedmen's Bureau to help recently freed slaves integrate into society.[48] There, government took an expressly race-conscious measure to remedy a serious social problem. To suggest that the race-consciousness of chattel slavery and that of the Freedmen's Bureau is identical is deeply mistaken.

[3] First, each program had a different *intent*. Slavery was intended to subordinate a whole class of human beings into an inhuman status. By contrast, the Freedman's Bureau was intended to help liberate that class. For those who think that intent is irrelevant, consider our opposite reactions to killing-for-hire and killing-for-self-defense.[49] Both involve killing, but the intent differs, which makes all the difference.

[4] Second, regardless of intent, each program had a different *impact*. The concrete impact of slavery and Jim Crow was the political, cultural, and economic subjugation of an entire class of Americans. By contrast, programs like the Freedmen's Bureau did nothing to disenfranchise Whites, stigmatize them, or relegate them to a disfavored caste.

[5] Third, each program had a profoundly different social *meaning*. In moral terms, the meaning of Jim Crow was to deny racial minorities the most basic respect as an equal. In contrast, the meaning of the Freedmen's Bureau was not to deny equal respect to those Americans excluded from such programs. Today, the exact same contrast in intent, impact, and meaning can be made between old-style discrimination on the one hand and affirmative action on the other.

[6] Still, while conceding some distinction between Jim Crow and affirmative action, opponents of affirmative action argue that it is too difficult to distinguish between malign and benign race-based policies. They contend that it is wiser to be like Ulysses and bind ourselves to the mast to stave off the Sirens of race-consciousness. But this approach, alluringly heroic, ignores significant costs—namely, apathy toward continuing racism.

II.C.2. Color-Blindness Is Gratuitous in an Era of Judicial Retrenchment

[1] The Supreme Court recently decided in *Adarand v. Pena*[50] that race-conscious decisions, whether apparently malign or benign, must be evaluated under a notoriously difficult standard known as "strict scrutiny." In other words, affirmative action programs can be implemented only if the institution demonstrates a compelling interest, such as the elimination of the present effects of past racial discrimination by the institution itself or educational diversity.[51] Furthermore, the institution must show that the use of racial classifications is narrowly tailored to that compelling interest.

[2] Each of us disagrees with the holding in *Adarand*.[52] In particular, we disavow how the court used the Japanese American internment to justify its conclusion.[53] We also do not believe that the only valid arguments justifying affirmative action are those that the Court has identified as "compelling." Nevertheless, as controlling Supreme Court precedent, *Adarand* substantially restricts the type of affirmative action programs that can continue to exist.

[3] Despite this aggressive constitutional check against race-conscious remedies already in place, opponents of affirmative action would prohibit even those few affirmative action programs that would satisfy this most strict scrutiny. In other words, they would bar even a program narrowly tailored to a genuinely compelling interest, one that would move us toward a more just society. Such draconian measures smack of stingy self-interest. It is overkill.

III. AFFIRMATIVE ACTION & ASIAN PACIFIC AMERICANS

III.A. APAs Have Suffered Racial Discrimination: The Past

[1] To the extent that affirmative action responds to racial discrimination, we need a better picture of the racial injustice that Asian Pacific Americans ("APAs") have endured. While this section aims to explore the history of many APA experiences, it is not meant to be exhaustive. Rather, it is a more modest attempt to offer background that will illuminate the nature of discrimination against APAs.

III.A.1. The Law Explicitly Discriminated Against Asian Immigrants

III.A.1.a) Immigration

[1] While color-blindness is in political vogue among some contemporary circles, that was not the case in the nineteenth century, when the first Asians arrived in the United States in substantial numbers.[54] As Chinese laborers arrived in Hawaii and California to work in farms and mines, White labor resentment against a "Yellow" invasion of "coolie" labor quickly mounted. America soon began erecting a wall around its borders that was distinctly color-conscious.

[2] In 1882, Congress passed the Chinese Exclusion Act,[55] the first major federal immigration law and also the first law ever to institute a racial restriction on immigration.[56] As Chinese immigration slowed, Japanese immigration increased to satisfy the need of American businesses for cheap labor. But in 1907 and 1908, under significant pressure from the Western States, President Theodore Roosevelt extracted the Gentlemen's Agreement from Japan to stop issuing passports to laborers. As immigration from other Asian countries commenced, in 1917, Congress responded by enacting the Asiatic Barred Zone, which excluded most immigrants from an area encompassing India, Southeast Asia, and the Pacific Islands. The advocates for this legislation, along with members of Congress and the Justices of the Supreme Court who later reviewed the laws, explicitly stated race-based reasons to prevent Asians from coming to America.

[3] In 1924, Congress took a more drastic step and barred all "aliens ineligible for citizenship" from coming to the United States.[57] Since only Whites and persons of African descent (the latter only due to a post-Civil War amendment to the original statute) were eligible for citizenship, this law effectively barred entry of all Asians. Significantly, however, the law accomplished its racial effect without explicitly mentioning race, using instead the code phrase "aliens ineligible for citizenship."[58]

[4] Only in 1952, by passing the McCarran-Walter Act, did Congress more or less erase the color bar from our immigration laws. But even the McCarran-Walter Act was not racially neutral. Although it ended the Asiatic Barred Zone, the Act replaced it with an Asia-Pacific Triangle. Immigration of persons indigenous to

this Triangle was capped annually to a mere 2,000-person upper ceiling. Under this limitation, a person of Chinese descent—even if he was a native resident and citizen of a Western nation—would be counted toward the 2,000-person limit. This racial attribution rule applied exclusively to Asians. Not until the comprehensive 1965 reform of our immigration laws could it be said that America had stopped explicit racial discrimination against Asians.[59]

[5] Discriminatory immigration laws obviously limited the numbers of Asians who could arrive in this country. But they also affected Asian immigrants and their citizen children already here: They sent an unmistakably hostile message not only to Asians in Asia, but to APAs already in the United States that they did not belong to America.[60]

III.A.1.b) Citizenship

[1] To be an American, an individual must be allowed not only to come to this nation's shores but also to become a citizen. Much as the law forbade most Asian immigrants from arriving, it prevented Asian immigrants who had already arrived from ever becoming citizens.

[2] The first naturalization law, passed in 1790, restricted naturalization to "free White persons." This was amended in 1870, after the Civil War, to include persons of African descent. Since Asian immigrants were deemed to be neither White nor of African descent, they could not become citizens. In numerous cases, culminating in a pair of Supreme Court decisions in the 1920s, judges repeatedly recognized that Asian applicants for naturalization were qualified in every respect but one: They were not White.[61]

[3] All Americans should be shocked to learn that naturalization rights were granted to Asians only in the mid-twentieth century: in 1943 for Chinese, 1946 for Asian Indians and Filipinos, and 1952 for all other Asians. Thus, only a half century ago, America considered Asian immigrants so debased as to be barred from the fold of citizenship.[62]

All Americans should be shocked to learn that naturalization rights were granted to Asians only in the mid-twentieth century: in 1943 for Chinese, 1946 for Asian Indians and Filipinos, and 1952 for all other Asians.

[4] The Fourteenth Amendment to the Constitution, ratified in 1868, confirmed that there was another path to citizenship—birth on American soil. Despite the express language of the Fourteenth Amendment,[63] the question whether Asians born in America would be American citizens was decidedly controversial.[64] Not until 1898 did the Supreme Court resolve this issue in favor of Asians in *United States v. Wong Kim Ark*.[65] But as recently as 1942, this principle of citizenship was formally challenged in federal court in an attempt to strike all individuals of Japanese ancestry born in the U.S. from the voter rolls.[66]

[5] Worse yet, ominous calls to eliminate the citizenship clause of the Fourteenth Amendment have been heard in the Capitol.[67] Indeed, the Republican party platform calls for amendment of the U.S. Constitution to deny citizenship to children born in America to undocumented aliens.[68] Assistant Attorney General Dellinger has warned that this would create "a permanent caste of aliens, generation after generation, born in America but never to be among its citizens."[69]

III.A.2. APAs Suffered as Second Class Aliens

[1] Until only a generation ago, APAs were treated as distinctly second class *aliens* (one cannot properly say "citizens"). Unable to naturalize, they were politically disenfranchised and barred from participatory politics. Subject to widespread prejudice, they were often the target of racially-motivated violence, especially in uncertain economic times.[70] By one count, there were over three hundred documented murders of Chinese as a result of racial violence in the West between 1860 and 1887.[71]

[2] At various times and places, APAs were denied social and civil rights that would have signaled respect as equals.[72] They could not live next to Whites. They could not marry Whites.[73] They could not learn alongside Whites.[74] APAs could not testify against Whites in a court of law, making it difficult if not impossible to enforce the few rights they possessed.[75]

[3] In addition, APAs suffered widespread de jure and de facto discrimination in their attempt to work for a living. California enacted a Miner's Tax in 1852 specifically targeting Chinese miners. San Francisco manipulated its licensing authority to close Chinese laundries while allowing White laundries to remain open.[76] Even in the middle of this century, California barred alien Japanese (remember, Japanese immigrants could not naturalize) from fishing in state waters.[77] What was left for APAs, then, were second-rate business and service-oriented employment opportunities, consigning them to become launderers, gardeners, house boys, and maids.

[4] Finally, APAs faced large-scale economic disenfranchisement through the alien land laws. Threatened by increased Asian competition in farming, various states forbid "aliens ineligible for citizenship" (the code phrase for Asians) from owning land. The first alien land law was passed in the State of Washington in 1886. California passed its alien land law in 1913. Upon judicial challenge, the Supreme Court approved these laws in a series of cases in 1923[78] on the theory that there was no racial or alienage discrimination and that the State has the right to limit property ownership to citizens. Only after the Supreme Court signaled ambivalence toward these decisions, perhaps regretting its approval of the Japanese American internment during World War II,[79] did the California Supreme Court strike down its alien land law as unconstitutional in 1952.[80]

III.A.3. We Imprisoned More than 110,000 Japanese Americans During WW II

[1] The internment of Japanese Americans has been acknowledged by the President, Congress, and, most recently, the Supreme Court as a shameful episode in our nation's history.[81] If people know of only one incident of racial discrimination against APAs, internment is likely to be it. Internment is important because it reveals much about the nature of persistent anti-Asian prejudice.

[2] The bombing of Pearl Harbor on December 7, 1941, set in motion the eventual internment of over 110,000 persons of Japanese descent without due process. Over two-thirds were American citizens.[82] Society generally assumed, as did General DeWitt, head of the Western Defense Command, that all Japanese Americans were incorrigibly foreign, with dangerous loyalties to Japan. DeWitt testified: "A Jap's a Jap. . . . It makes no difference whether he is an American; theoretically he is still a Japanese and you can't change him. . . . You can't change him by giving him a piece of paper."[83]

[3] Accordingly, society would not distinguish between the enemy Japan and Americans who happened to be of Japanese descent. By contrast, society had little difficulty distinguishing German Americans and Italian Americans from the enemy states Germany and Italy. Neither group of European Americans was subject to blanket removal from their homes and imprisonment in internment camps.

[4] The Supreme Court affirmed the constitutionality of the curfew and exclusion orders imposed on persons of Japanese descent in 1943 and 1944. In the well-known *Korematsu* case, the Court introduced the notion that "all legal restrictions which curtail the civil rights of any single racial group are immediately suspect."[84] Despite this pronouncement, the Court rubber-stamped the government's unsubstantiated claims of military necessity, even in the face of readily-available evidence of stereotyping and anti-Japanese racism.

[5] Perhaps the Court's misstep was caused by the government's purposeful suppression of evidence from the Office of Naval Intelligence, Federal Bureau of Investigation, and Federal Communications Commission, all of which exculpated the Japanese Americans.[85] On the other hand, even without such evidence, Justice Murphy knew enough to dissent vociferously in *Korematsu*, which he denounced as a fall into "the ugly abyss of racism."[86] The governmental misconduct in suppressing evidence led a federal court nearly a half-century later to vacate the conviction of Korematsu himself, though the *Korematsu* decision itself remains unaffected.[87]

[6] In 1982, a Commission charged by Congress to study the internment concluded that the "broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership,"[88] not any genuine military necessity. In other words, it was a tragic wartime mistake. But as historian Roger Daniels has cautioned:

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[7] *[T]he general tendency of educated Americans . . . to write the evacuation off as a 'wartime mistake' is to obscure its true significance. Rather than a mistake . . . the legal atrocity which was committed against Japanese Americans was the logical outgrowth of over three centuries of American experience, an experience which taught Americans to regard the United States as a White man's country . . . .*[89]

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[8] Following the Commission's report and during the debate over reparations for the internment survivors—most of whom lost their homes, their livelihoods, their possessions, and years of freedom—some members of Congress continued to insist that the internment was justified. Forgetting that most of those in-

terned were American citizens, certain members of Congress even argued that internment victims should not be compensated unless the government of Japan compensated American veterans. Similarly, the Smithsonian Institute faced protests and bomb threats when it installed an exhibit critical of the internment.

III.B. The Model Minority Myth

[1] All APAs should be familiar with the model minority myth. A racial stereotype since the 1960s, the model minority myth portrays APAs as superminorities.[90] According to the myth, APAs are a racial minority that has succeeded through education and hard work, and whose income and wealth match or exceed that of White Americans. The model minority myth emphasizes the success of APAs, especially as compared to other people of color.

[2] In the affirmative action debate, the model minority myth has surged in prominence. Politicians suggest either that APAs are top students who are singled out for mistreatment by affirmative action or that APA success shows that affirmative action is unnecessary.[91]

Politicians suggest either that APAs are top students who are singled out for mistreatment by affirmative action or that APA success shows that affirmative action is unnecessary.

III.B.1. The Model Minority Myth Is Misleading

[1] The numerous television reports, print articles, and speeches that describe APAs as the model minority depend principally on the claim that APAs have household incomes equal to or greater than those of Whites. Like other statistics, this single measurement can be misleading.

[2] First, APAs generally have more individuals contributing to household income than the national average, making that statistic an inapt basis for comparison.[92] Second, APAs tend to be geographically concentrated in New York, California, and Hawaii, states with higher costs of living and above-average incomes for all residents.[93] Third, comparisons based on census data are misleading since the census's definition of *White* includes persons of *Hispanic* origin.[94] The more accurate racial comparison would be between non-Hispanic Whites and APAs.

[3] In sum, the data suggesting higher absolute levels of APA household income, if interpreted carefully, belie the supposed "equality of opportunity" proclaimed by affirmative action opponents.[95] We provide further evidence below of continuing discrimination against APAs, notwithstanding their "model" status.[96]

III.B.2. APA "Success" Has Non-Racist Explanations

[1] While the picture of unlimited economic and academic success of APAs is inaccurate, thoughtful analysis still reveals relative success for APAs in education and income. It is true, for example, that a greater percentage of APA men and

women are college graduates than their White counterparts.[97] Rather than attributing this achievement to biological or cultural deficiencies within any racial group, we believe such differences can be explained by specific legal, political, and social factors that have shaped the APA community.

[2] For instance, our immigration laws favor highly-educated Asian professionals. The watershed 1965 Immigration Act expressly stated a preference for educated professionals, especially in the scientific, medical, and engineering fields.[98] At the time, the Cold War and the space race demanded an influx of scientific elite to help sustain U.S. military-industrial dominance. Immigrants from elite families in Asia and other countries were attracted by and absorbed into the expanding technological economy.[99]

[3] In addition to immigration policy, geopolitical changes also influenced Asian immigrant demographics. The 1972 U.S.-China détente and the 1975 withdrawal of U.S. troops from Vietnam profoundly realigned domestic and international politics in East and Southeast Asia, thereby rendering many Asian dictatorships politically unstable. Such instability, often accompanied by economic crises, precipitated the immigration of many upper and middle-class families from Taiwan, Hong Kong, South Korea, the Philippines, Thailand, Indonesia, Singapore, and Malaysia.[100] From 1965 to the present, the highly educated and upper/middle-class segments continue to be disproportionately represented among APA immigrants, especially those from East and South Asia.

[4] Finally, cultural reactions to ongoing racism may be another explanation for improved socio-economic mobility for APAs. This mobility may have little to do with anything essential to Asian cultures as much as their historically contingent reaction to limited opportunity. Professors Stanley Sue and Sumie Okazaki have argued, for instance, that ethnic, racial, and immigrant discrimination blocked off various avenues of success for APAs. Since APAs saw no future in politics, sports, or entertainment, they turned their attention toward education.[101] And as they enjoyed mild success through education, this belief—that educational investment is the sole path to success in America—was reinforced.[102] Indeed, this belief may have been bolstered by the model minority myth, which inculcated teachers to encourage and place high expectations on APA students while subconsciously discouraging or placing lower expectations on other minorities.

III.B.3. The Model Minority Myth Is Dangerous

[1] Like any racial stereotype, the model minority myth hurts those who are its subject. Since the public assumes that APAs are uniformly doing well, they do not hear APA requests for help. This laissez-faire approach to all APAs persists notwithstanding the tremendous heterogeneity among the ethnicities that make up the racial category APA.[103]

[2] Also, in difficult economic circumstances, the very same cause for compliment is condemned: APAs once seen as hard workers become unfair competitors,[104] and anti-Asian prejudice is excused out of an assumption that APAs are doing too well. Even worse, Whites and other people of color may resent APAs not for who we are, but for the model minority myth about us.

[3] The model minority myth also harms other racial minorities. From its introduction, the model minority myth has been used to chastise other minorities, to tell them that they are inferior to APAs, in genes or culture. When the model minority image was introduced, the sociologist who described Japanese Americans sympathetically did so, he explained, to contrast them with "what might be termed, 'problem minorities.'"[105] More recently, Richard Herrnstein and Charles Murray asserted in *The Bell Curve* that APAs and Whites were inherently more intelligent than African Americans,[106] while Dinesh D'Souza argued in *The End of Racism* that APAs and Whites had cultures superior to that of African Americans.[107]

[4] Whatever else APAs decide about affirmative action, we should not allow ourselves to be used to attack other people of color.[108] Pitting racial minority groups against one another represents the worst form of divide-and-conquer political strategy. APAs must refuse to believe that they are superior to Whites, non-Whites, or anyone else. This is not to denigrate the accomplishments of APAs or our hard work. But APAs must refuse to buy into derogatory stereotypes that other people of color have no achievements or shirk hard work. History teaches us that not long ago, the exact same criticisms were leveled at us, that *we* were the stupid, the unassimilable, the depraved, the criminal.[109] And our own experiences, whether they be of racial epithets, glass ceilings, or hate crimes, reveal the continuing existence of racial prejudice.

III.C. APAs Still Suffer Racial Discrimination: The Present

[1] Many might agree that racism hurt APAs in the distant past, but question whether such racism continues in the present. They assume that APAs cannot possibly face discrimination because they are the "model minority." Although the Civil Rights Movement has unquestionably decreased the quantity and quality of racism against all people of color, racism continues to burden APAs. We may be optimistic about the future, but we should also be realistic enough about the present to realize that racism has not gone.

III.C.1. Stereotypes Plague APAs

[1] For example, stereotypical portrayals of APAs still mark us as unassimilable foreigners, the very same prejudice that contributed to racist immigration and naturalization policies, economic discrimination, and internment.

[2] Consider Senator Alfonse D'Amato's egregious caricature of Judge Lance Ito, who presided over the trial of O.J. Simpson. Judge Ito is a U.S.-born citizen, whose parents were in fact interned during World War II. He speaks English with a "standard American accent."[110] Nevertheless, Senator D'Amato mocked him in a halting, ungrammatical, heavily-accented English: "Judge Ito loves the limelight. He is making a disgrace of the judicial system. *Little* Judge Ito. . . . Judge Ito with the *wet nose*."[111]

[3] These stereotypes, perpetuated not only by popular media, but by political leaders,[112] help construct society's conception of APAs. In turn, such views help construct limits, such as glass ceilings in employment, in the lives of APAs.[113] They also lead to racial harassment, as in the case of Marine Corps. Captain Bruce Yamashita.

[4] When Captain Yamashita entered Officer Candidate School, he had impeccable credentials. A star tailback in high school, he had been active in Hawaiian politics,[114] had excelled in education, and already had a juris doctorate (J.D.) and masters in international affairs (M.S.F.S.) from Georgetown University. Nevertheless, at Officer Candidate School, he was hounded by racial slurs. He was told to "go back to your country," informed that the U.S. had "whipped your Japanese ass" [115] in World War II, and routinely called "Kawasaki" and "Yamaha."[116]

[5] The slurs were not enough to deter Captain Yamashita, but he was later dismissed for alleged "lack of leadership." Captain Yamashita refused to accept this injustice and eventually won a reinstatement with an official apology from the U.S. Navy and Marine Corps. This episode should give pause to all Americans. APAs in particular should wonder: If even "hyper-qualified" candidates can suffer such racial harassment, what fate awaits those who are merely "over-qualified" or just "qualified"?

III.C.2. APAs Suffer from Employment Discrimination

III.C.2.a) The Parity Concept Introduced

[1] Because subtle, institutionalized prejudice is persistent but difficult to expose, civil rights officials began in the early 1970s to search for more practicable tools to root out racism. They began to compare the percentage representation of minorities in the relevant labor, business, or applicant pool (baseline percentage) against their percentage representation in employment, contracting, or university admissions (actual representation).[117] "Parity" is defined as existing when actual representation approximates the baseline percentage. If a minority was under parity, government officials became concerned about possible racial discrimination. If a minority was at or over parity, they assumed an absence of discrimination.

[2] The parity measurement came into prominence after the *Regents of the University of California v. Bakke*[118] Supreme Court decision in 1978, when Justice Powell announced the Court's "diversity" rationale upholding the constitutionality of some race-conscious admissions schemes. For a time, the turn toward a diversity-based rationale, measured in terms of "parity," allowed affirmative action to continue in the face of Supreme Court retrenchment on civil rights issues. As long as the Court was willing to call "diversity" a compelling interest, [119] many forms of affirmative action could flourish in relative obscurity, under the patina of constitutionality left by *Bakke*.[120]

III.C.2.b) APAs Are Under-Parity or Would Be but for Affirmative Action

[1] In many areas, APAs are not near parity.[121] In academia, APAs are underrepresented in numerous fields, such as history (2.2%), sociology (2.2%), English/literature (2.1%), philosophy (1.8%), education (1.6%), psychology (1.4%), political science (1.3%), and law (0.9%),[122] and are conspicuously underrepresented in higher education administration and management.[123] Nonetheless, the predominant framing of racial discrimination issues in Black-White terms diminishes the significance of APA underrepresentation.[124]

[2] The same goes with APA contractors. As a case study, consider California, in which multiple local government studies have documented the under-parity status of APA contractors. For example, in San Francisco in the late 1980s, APAs

constituted 20% of the baseline percentage of construction contractors; however, they received only 5% of the school district's construction contracts and less than 1% of the city's overall construction contracts.[125]

[3] Similarly, a 1992 local study of city employment in San Francisco revealed that fewer than half of the municipality's departments met the 1990 census workforce parity figure of 2.9%.[126] APA professionals in San Francisco are particularly underrepresented in the fields of public safety and judicial services. The city and district attorneys offices and police departments are at 50% of the APA parity rate or less.[127] Periodic studies indicate that workforce parity for APA professionals in San Francisco is declining, with fewer departments today meeting parity than in the previous 10 years.[128]

[4] Finally, when APAs are at parity, it is often due to affirmative action. Take firefighters for example. In 1974, the San Francisco Fire Department had only four APAs out of 1800 firefighters. After a court-ordered affirmative action plan, the Department now has 174 APAs. As explained by firefighter Captain Bernie Lee, "[w]ithout affirmative action . . . Asian Pacific Americans would not have had the opportunity to enter in such large numbers."[129]

Recent data show that, among all racial groups, APA faculty suffer one of the lowest tenure rates (41%), significantly lower than the overall rate (52%).

III.C.2.c) Parity Obscures Discrimination Against APAs

[1] From statistics that show APAs to be at or over parity, society jumps to the conclusion that APAs are free from discrimination. Unfortunately, these statistics do not tell the whole story. Not only do these purely quantitative measures miss qualitative differences in treatment afforded APAs,[130] they also invite misconceptions colored by the model minority myth.

[2] First, just as the presumption that "under-parity *necessarily* means discrimination" is wrong, so is the presumption that "parity *necessarily* means no discrimination." The Asian admissions controversies of the 1980s illustrate that over-parity representation and discrimination against APAs are by no means mutually exclusive.[131] Indeed, various studies reveal significant evidence of over-parity representation in certain fields coupled with continuing discrimination.[132]

[3] Second, the numbers showing over-parity status in one field might hide the related under-parity in other fields. Take the distribution of Ph.D.s for example. In 1993, almost seventy percent of all APA Ph.D.s were earned in engineering, life sciences, and physical sciences.[133] And in these fields, APAs enjoy over-parity status. On the other hand, as of 1992, APAs were seriously underrepresented in the humanities and social sciences. Similarly, a study of San Francisco city government employment reveals that APA professionals are concentrated in the di-

visions of Operations and Finance, Education, and Health. Thus they may be over-parity as "engineers, accountants, analysts and technicians," but under-parity as "police officers, firefighters, or attorneys."[134]

[4] Third, over-parity status at the entry-level does not mean over-parity status higher up on the promotion ladder, when APAs bump into the "glass ceiling."[135] For instance, recent data show that, among all racial groups, APA faculty suffer one of the lowest tenure rates (41%), significantly lower than the overall rate (52%).[136] Similarly, at the executive or managerial level in higher education, APAs occupy only one of every one hundred positions.[137]

[5] Fourth, facile inferences drawn from over-parity statistics deny the ethnic, class, and gender heterogeneity of the APA community.[138] Aggregated group statistics offer a monolithic picture of APA success; but whatever economic and educational achievement that has been attained, it is not shared uniformly by the various subgroups within the APA category. For example, most of the representation in higher education employment is attributable to East Asian and South Asian Americans. Just because East Asians, say, are over-parity (in certain fields, in certain career stages), one should not presume that all other APAs are similarly over-parity. Gender provides another crucial but ignored variable. Gender differences between APA men and women may be as great or greater than interethnic differences.[139] To cite one example, APAs are the only racial minority group where men outnumber women in such a high proportion (79% to 22%) in full-time faculty positions.[140]

III.C.3. APAs Are Victims of Racial Violence

[1] Finally, consider the racial violence that continues to plague APAs. Although exact numbers are unavailable, various governmental commissions and community groups have detailed a disturbing rise in the number of hate crimes.[141] In fact, according to the U.S. Civil Rights Commission, in certain cities, such as Boston and Philadelphia, APAs suffer the highest per capita hate crime rate of all racial minorities.[142]

[2] A defining moment in racial violence against APAs occurred in 1982 with the murder of Vincent Chin. Mr. Chin, a Chinese American engineer, was beaten to death with a baseball bat by two laid-off auto workers, who blamed Japan for their unemployment. This hate crime "stands out as a perverse symbol of racist violence," for it reveals a sickening, irrational causal chain. The unemployed workers "transferred blame not only from the Japanese government to the Japanese people, not only from the Japanese people to United States citizens of Japanese descent, but finally from Japanese Americans to anyone unlucky enough to bear Asian features."[143]

[3] This horrific event catalyzed APA communities across the nation to unite against racial violence. While such community activism has increased societal awareness of the problem, hate violence continues to endanger our communities. For example, in 1992, Mark Cleaver, clad in military camouflage and heavily armed, shot three people to death, including Junko Nakashima, the wife of a prominent nursery owner. The killer's half-brother stated that Cleaver felt the Japanese came to this country, bought up a lot of land, and got rich while

"Americans" remained poor. "He felt ripped off by the Nakashima family," the murderer's relative explained, "Wouldn't you?"[144]

[4] Even more recently, in the summer of 1996, Thien Minh Ly, a UCLA graduate, was stabbed dozens of times by a suspect who casually noted in a personal letter that he had recently killed "a jap."[145] Police investigation revealed the suspect's ties to a White Supremacist organization, and after meetings with APA community activists, the prosecution has sought a hate crime penalty enhancement.[146]

[5] Regrettably, there are simply too many incidents of racial violence to recount.[147] Indeed, there are enough to warrant an annual survey by the National Asian Pacific American Legal Consortium ("NAPALC"). According to NAPALC's most recent audit, 458 anti-Asian incidents were reported in 1995. Southern California witnessed a striking 80% increase in such incidents from 1994, with New York and Northern California reporting approximately 10% increases.[148] These hate crimes, which not only injure the immediate victim but also terrorize the surrounding APA community, should demonstrate—even to skeptics—that racial discrimination against APAs continues.

III.D. Admission Ceilings: The Problem of Negative Action

[1] Some evidence suggests that universities, concerned about too many APAs on their campus, have instituted informal ceilings on APA admissions. Certain politicians have argued that such admission ceilings on APAs result naturally from affirmative action for other racial minorities. They contend that once you take race into account in admissions, race can be a plus as well as a minus.[149] Needless to say, this has been a source of great concern to APA communities. And given the issue's complexity, APA frustration is understandable.

III.D.1. APAs Can Be Treated with Affirmative Action, Neutral Action, and Negative Action

[1] To clarify matters, it is helpful to consider three possible regimes. First, APAs could be included in race-based affirmative action. Second, APAs could be excluded from affirmative action and treated indistinguishably from Whites who are similarly ineligible. Third, APAs could be capped by an admissions ceiling such that they are denied admission in order to admit more Whites (not other racial minorities). These three regimes may be called affirmative action, neutral action, and negative action.[150] We discuss each regime in turn.

[2] *Affirmative Action.* Given that the model minority myth is a myth, it may make plenty of sense to include APAs, or at least certain Asian ethnicities, in *affirmative* action programs. Indeed, in those fields where a race-based affirmative action program is in place and APAs are under-parity, we recommend a presumption in favor of their inclusion.[151] Although the ultimate decision is case-specific and fact-intensive, we believe that in areas of under-parity, some cogent explanation must be offered for their exclusion.

[3] *Neutral Action.* When such an explanation is offered, it will be reasonable to exclude APAs from the affirmative action program and treat them no differently from everyone else excluded, such as Whites. In other words, admissions will be *neutral* as between APA and White admissions. The rationale would be that

since APAs do not warrant affirmative action in this particular case, they will be treated no differently than Americans who happen to be White.

[4] *Negative Action.* Negative action does not treat APAs neutrally as compared to Whites. Rather, it favors Whites over APAs. This is what happens when universities institute an admissions ceiling on APAs. It means that at least one APA will be denied admission, although if she were White, she would have been admitted.

III.D.2. We Can Simultaneously Reject Negative Action and Embrace Affirmative Action

[1] While it may be perfectly legitimate to treat APAs with affirmative action or neutral action, it is never appropriate to treat them with negative action. Negative action is illegal. APAs who are harmed by an explicit program of negative action can and should protest and file lawsuits, which they should win under current anti-discrimination laws.

[2] What APAs must understand is that negative action against us does not result from affirmative action for other minorities. In fact, in cases of proven racial disparities between APA and White admission rates, the causes have been either stereotypical treatment of APA applicants or other preferences, such as that for alumni children, who tend to be predominantly White.[152] Furthermore, eliminating affirmative action does not eliminate negative action. Regardless of whether a prestigious university practices affirmative action for other racial minorities, it may still enact informal measures to limit the number of APAs on campus.

[3] In sum, the only two legitimate regimes, especially for APAs, are affirmative action and neutral action. The specific facts of the situation will determine which regime is appropriate. When APAs are not included in affirmative action (and given neutral action), they will suffer some indirect burden caused by the preferential treatment given to other racial minorities. But this burden will be shared across the board among all those who are not included in affirmative action, such as Whites. And for reasons identified above, we believe that the benefits of affirmative action outweigh the burdens, especially when they are distributed broadly.

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IV. CONCLUSION

We Have Common Goals

[1] America's seemingly intractable legacy of racism has hurt all Americans, especially those of us who happen to be racial minorities. Besides wasting human resources and destabilizing our society, racism has led to needless stereotyping, suffering, and cruelty. It is this social problem of racism and White privilege that affirmative action fights. We seek a society where race is no longer an axis of social division, inequality, and hatred, nor used to create a repressive social, economic, or political status—a goal that we hope is shared by all Americans.

APAs Can Play a Critical Progressive Role

[2] We must all recognize that racial discrimination continues to exist in America, even against APAs. We must further recognize that affirmative action helps all Americans, including APAs, and that supporting affirmative action does not mean authorizing negative action against APAs.

[3] APAs can play an extraordinarily powerful role in the debate because they can declare their support for the programs even when they are not directly benefited by them. In certain contexts, it may be legitimate not to include APAs—or other racial minorities for that matter—in affirmative action programs. In such cases, they should be treated indistinguishably from Whites.[153] If a White person then complains about the "preferential treatment" given to certain racial minorities, then the similarly situated APA can answer:

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[4] As a racial minority, I continue to suffer from various forms of racial discrimination. I have personal stories as well as statistical documentation to prove it. And in that sense, I am disadvantaged compared to you, simply because of the color of my skin. Nevertheless, I am willing to bear the same burden that you bear caused by affirmative action. I am willing to share this burden to help us get beyond racism, to reach a fairer society. I am willing to go beyond my self-interest in order to strive for a community of justice. Are you?

We Must Seek Alternatives

[5] As the next generation of APA scholars, activists, and political participants, we must demand alternatives that go beyond identifying victims, taking existing sides, or proclaiming good intentions without forwarding solutions. To those who wish to abolish affirmative action, we must ask what is their alternative. If they have none, their agenda should be rejected as non-responsive to the challenge of building a more equitable society.

[6] Recently, opponents of race- and gender-based affirmative action have advocated replacing it with class-based affirmative action. But these two programs are not mutually exclusive. Universities, for example, can and do consider multiple "diversity" factors—not only race, but also socio-economic disadvantage—in its admissions decision. We must also recognize that the two programs target different, although somewhat overlapping, problems. In particular, if social contact among the races is necessary to decrease racial prejudice, a race-based affirmative action program is better tailored to promote racial harmony. Finally, we must ask whether class-based affirmative action is being offered only as a ruse, to assuage progressives while dismantling race- and gender-based affirmative action. A genuine commitment to class equality would lead one to target resources at an individual's formative years—with anti-poverty programs that provide adequate housing, nutrition, and education to children. But oddly enough, the programs mentioned so far would instead give mild preferences late in life, in admissions or employment. This should give use cause for skepticism.

Most importantly, we must denounce the prejudice within our own communities, which allow us to care less about social justice and more about individual self-interest.

[7] In sum, we must demand serious, genuine alternatives that reject both liberal and conservative shibboleths. Liberals suffer a blindspot by thinking that all racial discrimination falls between Black-White poles. This tunnel-vision has allowed conservatives to rally to the cause of APAs and to portray us as a racial minority victimized by social engineering. We call upon liberals to take discrimination against APA communities seriously, to reject model minority stereotypes, and to include APAs, Latina/os, and Native Americans into national debates on race.

[8] Conservatives suffer their own blindspot. Their crusade to terminate affirmative action fails to address over-parity discrimination suffered by APAs. In fact, conservatives have typically led the charge to weaken anti-discrimination laws and the agencies that enforce them.[154] We call upon conservatives to cease using APAs as their "racial mascot"[155] to arrogate moral authority in furtherance of regressive policies.

[9] Finally, APAs must be mindful of their own blindspot: We possess a "simultaneity" in which we can be both victim and perpetrator of racial oppression.[156] We must reject a self-congratulatory embrace of the model minority myth and reject policies justified only by the narrowest self-concern. Most importantly, we must denounce the prejudice within our own communities, which allow us to care less about social justice and more about individual self-interest.

A Community of Justice

[10] The affirmative action debate affords APAs a unique opportunity to re-envision a multiracial democracy. In an era of global corporate restructuring and downsizing, APAs should do more than scramble for a piece of a constantly shrinking

pie. We should do more than aspire to be "model minority" managers of increasingly scarce resources. Instead, APAs should work toward a bolder reconstruction of society. In coalition with all those genuinely committed to social justice, we can together pursue a transformative program of social and economic expansion informed by the sort of deep democratic inclusion that places those least privileged at the forefront.

[11] It is our hope that this policy analysis has provided much food for thought. Modestly, we also hope it has elevated the quality of discussion on affirmative action and the role that APAs play in that debate. We would like to have persuaded those on the fence to support affirmative action, not as a panacea, but as a partial step toward a more comprehensive agenda to address pervasive and persistent inequalities. For those unpersuaded, we still wish to have shown that our support of affirmative action is not simply self-interested. Rather, it is based on a coherent commitment to fairness, which rejects self-interest and strives toward a national community of justice.

HOW TO USE THIS DOCUMENT

A Guide to Reading

[1] This document occupies an unusual space, somewhere between a ponderous academic article and terse commentary that conveys deeply felt sentiments bluntly. On the one hand, the authors have not made the exhaustive effort necessary to conform this document strictly to academic standards. Those interested in more traditional academic treatments are invited to read articles by the individual authors cited in the footnotes. On the other hand, this document goes much further in addressing the genuine complexity of affirmative action and its relationship to Asian Pacific Americans ("APAs") than most political and policy literature to date.

[2] Readers familiar with the affirmative action debate should skim Part II, which contains the general arguments in favor of affirmative action. They should turn their attention toward Part III, which addresses concerns particular to APAs.

A Guide to Using

[3] *Individuals*, especially APAs, who are genuinely uncertain or ambivalent about affirmative action should use this document to help examine and clarify their beliefs. *Community organizations* could use this document as the basis for discussion in an exercise of deliberative democracy.

[4] *Community and civil rights activists* in favor of affirmative action can use this document to bolster their cause. First, it can be shared with all those in positions of power who might be persuaded by its argument. Second, it can be used to augment the array of arguments favoring affirmative action currently used. In particular, it may profitably be used in speaker training sessions. The citations, data, and legal analysis are thorough and up-to-date.

[5] *Educators* in high schools, colleges, and graduate schools can use this document as a resource for analysis, discussion, and debate. As teachers, we have an obligation to approach the policy debate over affirmative action with comprehensiveness and care. This document should provide an additional, unconventional entry point of inquiry.

[6] *Government officials* can use this document to learn something about APAs, our history, the particular forms of racism we suffer, and the dangers of assuming that we are the model minority. This document directly answers the common cry of government officials that they do not know where APAs stand on the issue of affirmative action and race relations.

[7] Similarly, *media* can use this document to help fill a vacuum about APA thinking on affirmative action. The national media has been slow in recognizing that reporting racial politics without considering all racial groups, including APAs, is incomplete. Adding the views of APAs is essential, especially with affirmative action. This document provides not only useful background but a starting point from which to make further journalistic and investigative inquiries.

ACKNOWLEDGMENTS

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NOTES

[10] Two thousand five hundred copies of this policy analysis were printed in October 1996 and distributed throughout the country to elected officials, community leaders, civil rights organizations, educational institutions, and the media. The document was also made available through the Internet. A revised version of this policy analysis will be published by the UCLA Asian Pacific American Law Journal in 1997.

[11] To facilitate electronic distribution of this document, each paragraph is numbered for easy citation. Specific paragraphs may be referred to without page numbers by referring to Part and paragraph number, for example, as I.B, ¶3.

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[13] Media inquiries may be directed to any of the individual authors. For further information about future public policy projects by APA law faculty, please contact Professor Jerry Kang.

BIOGRAPHICAL INFORMATION

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ENDNOTES

1 Among many publications discussing affirmative action, a few of the recent books include: BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION (1996); CLINT BOLICK, THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION? (1996); TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1996); RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996); JOHN D. SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996); PAUL C. ROBERTS & LAWRENCE M. STRATTON, THE NEW COLOR LINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY (1995).

2 *See UC Regents, In Historic Vote, Wipe Out Affirmative Action*, L.A. TIMES, July 21, 1995, at A1.

3 For a comprehensive legal analysis of the initiative, see NEIL GOTANDA ET AL., LEGISLATIVE IMPACT OF PROP. 209, PRELIMINARY FINDINGS (1996) (on file with authors).

4 *See, e.g.*, H.R. 2128, 104th Cong., 1st Sess. (1995).

5 A few of the major publications that have discussed APAs and affirmative action are: DANA Y. TAKAGI, THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS (1992); ASIAN PACIFIC AMERICAN PUBLIC POLICY INSTITUTE, LEADERSHIP EDUCATION FOR ASIAN PACIFICS, COMMON GROUND: PERSPECTIVES ON AFFIRMATIVE ACTION . . . AND ITS IMPACT ON ASIAN PACIFIC AMERICANS (1995); Viet D. Dinh, *Multiracial Affirmative Action, in* DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION 280 (Nicolaus Mills ed., 1994); Theodore H. Wang & Frank H. Wu, *Beyond the Model Minority Myth, in* THE AFFIRMATIVE ACTION DEBATE 191 (George Curry ed., 1996); Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881 (1996); Jerry Kang, *Negative Action Against Asian Pacific Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1 (1996); Theodore H. Wang, *Swallowing Bitterness: The Impact of the California Civil Rights Initiative on Asian Pacific Americans*, 1995 ANN. SURV. AM. L. (forthcoming 1996); Sumi Cho, *Model Minority Mythology and Affirmative Action: Supreme Stereotypes of Asian Americans* 48-56 (June 11, 1996); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995); Selena Dong, Note, *"Too Many Asians": The Challenge of Fighting Discrimination Against Asian Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027 (1995); Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659 (1989); Norimitsu Onishi, *Affirmative Action: Choosing Sides; After Approval of a Ban by the University of California Regents, Asian-Americans Face Yet Another Divide*, N.Y. TIMES, Mar. 31, 1996, §4A (Education Life), at 26; Benjamin Pimentel, *Asian Americans' Awkward Status: Some Feel Whites Use Them as 'Racial Wedge' with Others*, S.F. CHRON., Aug. 22, 1995, at A1; Rene Sanchez, *Struggling to Maintain Diversity: UC Berkeley Takes Steps to Offset Ban on Affirmative Action*, WASH. POST, Mar. 11, 1996, at A1; Diane Seo, *Growing Asian Enrollment Redefines UC Campuses; Education: Their Influence Has Increased with Visibility But Affirmative Action Rollback Fuels Backlash Fear*, L.A. TIMES, Dec. 27, 1995, at A1; Amy Wallace, *UC Applications Drop Among Some Minorities; Education: White, Asians Apply in Record Numbers; Some See Dismantling of Affirmative Action as a Factor*, L.A. TIMES, Feb. 14, 1996, at A1.

For a bibliography on APAs and affirmative action, see Glenn Omatsu, *Behind the Affirmative Action Debate: Two Visions of America*, 21 AMERASIA J. 251 (1995-1996).

6 Institutional affiliations are for identification purposes only.

7 In light of the enormous impact that "race" has had on American history, it is strange to realize the difficulty of defining what "race" actually is. Current thinking views "race" not as a precise biological categorization as much as a social, cultural, and political construction that is anything but precise. *See, e.g.*, MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 53-76 (2d ed. 1994).

8 *See generally* MORRIS DEES, GATHERING STORM (1996) (documenting the growing menace that militia groups present to U.S. democracy and their links to White Supremacist or-

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ganizations); RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994).

9 When the FHA issued its underwriting guidelines to loan officers, it declared that "[i]f a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally contributes to instability and a decline in values." DENNIS JUDD & TODD SWANSTROM, CITY POLITICS 204 (1994). Judd and Swanstrom report that renowned sociologist and consultant to the FHA, Homer Hoyt, issued a 1933 report to the FHA on the racial "ranking" of the most favorable to least favorable mortgage candidates:

1. English, Germans, Scotch, Irish, Scandinavians
2. North Italians
3. Bohemians or Czechoslovakians
4. Poles
5. Lithuanians
6. Greeks
7. Russian Jews of lower classes
8. South Italians
9. Negroes
10. Mexicans

Id. Lest there be any doubt, Hoyt emphasized that the racial hierarchy was not fluid for people of color, regardless of class or culture: "Except in the case of Negroes and Mexicans . . . these racial and national barriers disappear when the individuals of the foreign nationality groups rise in the economic scale or conform to the American standards of living . . . ." *Id.*

10 George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the 'White' Problem in American Studies*, 47 AM. Q. 369, 372 (1995).

11 JUDD & SWANSTROM, *supra* note 9, at 205.

12 MELVIN OLIVER & THOMAS SHAPIRO, BLACK WEALTH/WHITE WEALTH 16 (1995).

13 *See generally id. See also* DAVID D. TROUTT, THE THIN RED LINE: HOW THE POOR STILL PAY MORE (1993) (documenting that poor people in minority neighborhoods pay more for basic services and necessities, such as food, housing, health care, banking, and credit services).

14 SKRENTNY, *supra* note 1, at 153 (quoting a speech by Lyndon Johnson).

15 *See generally* Keith Aoki, *Foreign-ness & Asian American Identities: Yellowface, World War II Propaganda and Bifurcated Racial Stereotypes*, 4 UCLA Asian Pac. Am. L.J. (forthcoming 1997); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 908-09 (1993).

16 *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987) ("This failure [to recognize that racism is both a crime and a disease] is compounded by a reluctance to admit that the illness of racism infects almost everyone.").

17 *PrimeTime Live: True Colors* (ABC television broadcast, Sept. 26, 1991). In fact, recent studies show that residential segregation is increasing, not decreasing. *See* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID 81 (1993) (arguing that despite high hopes in the early 1970s following the passage of various civil right laws, segregation of Blacks and Whites persists at extremely high levels that is "so intense that it can only be described as hypersegregation").

18 As philosopher Judith Jarvis Thompson put it: "No doubt few, if any [young White male applicants], have themselves, individually, done any wrongs to Blacks and women. But they have profited from the wrongs the community did. Many may actually have been direct beneficiaries of policies which excluded or downgraded Blacks and women perhaps in school admissions, perhaps in access to financial aid, perhaps elsewhere; and even those who did not directly benefit in this way had, at any rate, the advantage in the competition which comes of confidence in one's full membership, and of one's rights being recognized as a matter of course." JUDITH JARVIS THOMPSON, RIGHTS, RESTITUTION, & RISK: ESSAYS IN MORAL THEORY 152 (1986).

19 By "White" we mean what the Census Bureau would call non-Hispanic White.

20 MASSEY & DENTON, *supra* note 17, at 81, 109-14.

> Through a series of exclusionary tactics, realtors limit the likelihood of black entry into white neighborhoods and channel black demand for housing into areas that are within or near existing ghettos. White prejudice is such that when black entry into a neighborhood is achieved, that area becomes unattractive to further white settlement and whites begin departing at an accelerated pace. This segmentation of black and white housing demand is encouraged by pervasive discrimination in the allocation of mortgages and home improvement loans, which systematically channel money away from integrated areas. The end result is that blacks remain the most spatially isolated population in U.S. history.

Id. at 114.

21 Jerry Kang, *The Future of Affirmative Action in Higher Education*, CROSSCURRENTS 2 (Spring/Summer 1996); *see also* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 863 (1995) ("We believe that encounters among students from different backgrounds especially within an academic institution that seeks to encourage intergroup relations and discoursetend to reduce prejudice and alienation.").

22 *See* Amici Brief of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania at 13, Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (claiming that an independently compelling goal of affirmative action is "diversifying the leadership of our pluralistic society").

23 Memorandum from Walter Dellinger, Assistant Attorney General, to General Counsels, Justice Department Memorandum, June 28, 1995, 1995 DLR 125, text near note 37.

24 As the Supreme Court has explained in connection with broadcast diversity:

> The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. . . . Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 579 (1990), *overruled on other grounds*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

25 For further discussion of the connection between equality and the social meaning of governmental practices, see Jerry Kang, *Negative Action Against Asian Pacific Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. 1, 21-36 (1996) [hereinafter Kang, *Negative Action*].

26 South Central Los Angeles had lost 70,000 high-wage jobs between 1978 and 1982. As of 1990, one third of all residents lived in households beneath the poverty line; one fourth was on public assistance and high school drop-out rates ranged from 63 to 79%. *See* Kye-young Park, *The Morality of a Commodity: A Case Study of 'Rebuilding L.A. Without Liquor Stores,'* 21 AMERASIA J. 1 (1995/1996).

27 This is not to say that people can have role models only of their own race. Nonetheless, in America today, race continues to have social salience, such that the successes of a minority individual will often inspire other individuals of the same race to imagine and attempt similar success.

28 Stanley Fish, *Affirming Affirmative Action*, SALT EQUALIZER 7 (Summer 95). *See generally* STEPHANIE WILDMAN, PRIVILEGE REVEALED (1996). *See also* HARLON DALTON, RACIAL HEALING 105-26 (1995).

29 Peter H. King, *On California: Story of a Story*, L.A. TIMES, Apr. 5, 1995, at A3.

30 *Dateline* (NBC television broadcast, Jan. 23, 1996), *available in* WESTLAW, 1996 WL 6703887.

31 *Id.*

32 *Id.*

33 Richard H. Fallon, Jr., *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of AntiDiscrimination*, 60 B.U. L. REV. 815, 872 (1980) (emphasis omitted). Of the three conceptions of merit discussed, Professor Fallon notes that this conception "describes the reality of most programs of university admissions." *Id.*

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34 Chang-Lin Tien, *Affirming Affirmative Action, in* COMMON GROUND: PERSPECTIVES ON AFFIRMATIVE ACTION . . . AND ITS IMPACT ON ASIAN PACIFIC AMERICANS, ASIAN PACIFIC AMERICAN PUBLIC POLICY INSTITUTE 19, 20 (1995).

35 *See, e.g.*, JOEL DREYFUS & CHARLES LAWRENCE III, THE *BAKKE* CASE: THE POLITICS OF INEQUALITY 128-29 (1979) (discussing a remarkable increase in standardized test scores and grades of Berkeley law students between 1967 and 1976, and of medical students nationwide between 1957 and 1975); Jean Webb, *The 6 Percent Solution: Yale Law School's Admissions Process*, YALE LAW REPORT, Spring 1994, at 15-16 (noting that Yale is the most selective law school, and had a 1/3 minority representation in the preceding class); Peter Applebome, *The Debate on Diversity in California Shifts*, N.Y. TIMES, June 4, 1995, §1, at 1 (quoting Bob Laird, admissions director at the University of California at Berkeley, as saying, "There's a myth that in the course of diversifying the campus we've lowered our standards. . . . By any measure, the opposite is true. . . . [T]he current freshman class is stronger than the one 10 years ago."); Bruce Weber, *Inside the Meritocracy Machine*, N.Y. TIMES, Apr. 28, 1996, §6 (Magazine), at 44, 46, 56 (noting that Harvard College is simultaneously increasingly selective and committed to substantial minority representation). *See generally* Philip J. Cook & Robert H. Frank, *The Growing Concentration of Top Students at Elite Schools, in* STUDIES OF SUPPLY AND DEMAND IN HIGHER EDUCATION (Charles Clotfelter & Michael Rothschild eds., 1993).

36 *Cf.* HELEN L. HOROWITZ, CAMPUS LIFE: UNDERGRADUATE CULTURES FROM THE END OF THE EIGHTEENTH CENTURY TO THE PRESENT 189 (1987) (noting an increase in the number of 18- to 21-year olds attending college between 1930 and 1950); RICHARD N. SMITH, THE HARVARD CENTURY: THE MAKING OF A UNIVERSITY TO A NATION 169 (1986) ("Above all else, the G.I. Bill of Rights opened Harvard to a diversity of enrollment and outlook unimaginable [previously]."); *id.* at 214 (noting that the G.I. Bill and nationwide recruiting, including Blacks from the South, were part of Harvard's program of replacing "prewar standards of social and economic standing" with "more stringent tests of selectivity").

37 Troy Duster, *The Structure of Privilege and Its Universe of Discourse*, 11 AM. SOCIOLOGIST 73-78 (May 1976).

38 Ling-chi Wang, *Between Being Used and Being Marginalized in the Affirmative Action Debate: Re-envisioning Multiracial America from an Asian American Perspective*, 6 ASIAN AM. POL'Y REV. 49, 51-52 (1996).

39 Prior GPAs and standardized test scores are designed to predict future grades, but they do not accomplish this task perfectly. *See, e.g.*, Franklin Evans, *Recent Trends in Law School Validity Studies, in* IV REPORTS OF LAW SCHOOL ADMISSIONS COUNCIL SPONSORED RESEARCH, 1978-1983, at 347 (1984); James C. Hathaway, *The Mythical Meritocracy of Law School Admissions*, 34 J. LEGAL EDUC. 86 (1984); LINDA WIGHTMAN & DAVID MULLER, AN ANALYSIS OF DIFFERENTIAL VALIDITY AND DIFFERENTIAL PREDICTION FOR BLACK, MEXICAN AMERICAN, HISPANIC AND WHITE LAW SCHOOL STUDENTS (LAW SCHOOL ADMISSIONS COUNCIL RESEARCH REPORT 90-93 1990).

The Supreme Court has recognized that numerical indicators may poorly predict actual performance. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), a unanimous Court noted the "inadequacy of broad and general testing devices . . . as fixed measures of capability." It noted that "history is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment . . ." *Id.* at 433.

40 *Cf.* RONALD DWORKIN, LAW'S EMPIRE 394 (1986) (arguing that the proposition that one should not be judged on a quality beyond one's control "has been decisively rejected throughout American law and politics").

41 *See, e.g.*, John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491 (1993); Nancy Folk, *Deciding Who Goes to Yale, and Why*, N.Y. TIMES, Feb. 12, 1995 (Connecticut Weekly), at 3, 3 (quoting Yale's director of admissions as saying, "We have a stated commitment to students who are applying to us from families of Yale College graduates."); William Honan, *Picking a Class of '98: The Early Returns Are in*, N.Y. TIMES, Dec. 15, 1993, at B9, B9 (noting that Brown offers preferences to legacies).

42 *See, e.g.*, Douglas L. Edwards, *Rejected by College?*, N.Y. TIMES, Apr. 9, 1983, 1, at 23, 23 (Edwards, a former admissions officer at Brown, notes that preference is given to "'de-

velopment cases'that is, applicants from families perhaps wealthy enough to donate a dormitory or endow a department.").

43 *See* KAHLENBERG, *supra* note 1, at 54 n.75.

44 Ralph Frammolino & Mark Gladstone, *UC Lobbyist Actively Pursued Aid Requests; Education: Records Show He Kept Detailed Logs of Efforts to Gain Admission for Applicants Connected to Political Figures*, L.A. TIMES, Mar. 28, 1996, at A3; Ralph Frammolino & Mark Gladstone, *Politicians Sought Aid of UC Lobbyist; Education: State Officials Made Requests for Admissions, Housing Aid and Other Assistance at Every UC Campus, Records Show*, L.A. TIMES, Mar. 26, 1996, at A1.

45 Ralph Frammolino et al., *UCLA Eased Entry Rules for the Rich, Well-Connected; Education: Chancellor and Top Aides Gave Admissions Help to Friends or Relatives of Donors and Others Records Show*, L.A. TIMES, Mar. 21, 1996, at A1; Ralph Frammolino et al., *Some Regents Seek UCLA Admissions Priority for Friends; Education: Gov. Wilson and Others Who Pushed to End Affirmative Action Are Among Officials Who Sought Assistance, Records Show*, L.A. TIMES, Mar. 16, 1996, at A1.

46 Mark Gladstone & Ralph Frammolino, *UC Berkeley Panel Handles Admission Requests by VIPs; Education: Special Committee Reviewed 240 Such Bids Over Past Three Years and Took No Action on 204 of Them*, L.A. TIMES, Apr. 11, 1996, at A1.

47 *See* SKRENTNY, *supra* note 1, at 37-38:

> The federal government and forty-seven states give preferences to veterans who take the civil service examination, which, ironically enough, was designed to ensure merit hiring. The federal government and most states, among sundry other measures, simply add ten points to the scores of disabled veterans or their wives, and five points to the scores of nondisabled veterans. After the bonus points are added, veterans are often to be preferred over nonveterans with equal scores. Seven states give absolute preference to all veterans who pass the examination.

48 Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 294-95 (1996).

49 *See* Fish, *supra* note 28, at 8.

50 115 S. Ct. 2097 (1995).

51 We note that the Fifth Circuit has recently rejected educational diversity as a compelling interest in Hopwood v. Texas, 84 F.3d 720 (1996). The Supreme Court recently denied certiorari in this case. Texas v. Hopwood, 116 S. Ct. 2581 (1996). It is important to note that, as a matter of law, a denial of a petition for certiorari has zero precedential effect. It is technically wrong to infer that the Supreme Court either approves or disapproves of the Fifth Circuit's decision.

52 Before *Adarand*, race-conscious programs were often reviewed under what lawyers call "intermediate scrutiny." We strongly believe that this "intermediate" level provides the appropriate degree of scrutiny and that strict scrutiny, as currently understood, is unnecessary. This is because intermediate scrutiny would easily smoke out and invalidate any malicious acts of discrimination of the Jim Crow vintage, while recognizing the substantial differences between old-style racial discrimination and affirmative action.

53 In *Adarand*, the Court made prominent use of the Japanese American internment in explaining why strict scrutiny was necessary to review even benign race-conscious remedies. It is only a slight oversimplification to describe the Court's argument as, "Because we interned the Japanese Americans, we must get rid of affirmative action." *See generally* Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves From Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & L. 165 (1996).

54 The first APAs were Filipino seamen who abandoned their Spanish ships near Mexico and resettled in Louisiana in 1565 and 1815. *See* MARINA E. ESPINA, FILIPINOS IN LOUISIANA 38-39 (1988).

55 The Exclusion Act barred the entry of laborers for 10 years. The Act was amended and extended in 1884, 1888, 1892, and 1902, then made permanent in 1904. *See* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICAN THROUGH IMMIGRATION POLICY, 1850-1990, at 23-26 (1993). *See also* Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding the constitutionality of the 1888 Scott Act, which revoked tens of thousands of previously

valid return-entry certificates). The Exclusion Act was not repealed until 1943, when our political alliance with China in World War II made the Act intolerable.

56 Prior to the Chinese Exclusion Act, Congress passed the Page Law in 1875 partly to respond to the perceived problem of Asian prostitution. Historian Ronald Takaki notes that the law "was enforced so strictly and broadly [that] it served not only to exclude Chinese prostitutes but also to discourage Chinese wives from coming" to America. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 40 (1989).

57 Immigration Act of 1924, 43 Stat. 153, §13(c) (repealed 1952). A few Asians continued to enter the United States as non-quota immigrants through certain family unification exceptions.

58 This law principally targeted the Japanese. By this time, the Chinese had already been excluded by the Chinese Exclusion Acts.

59 Even after the 1965 reforms, Asian immigrants continue to suffer from a bureaucratic crawl in receiving visas. For example, spouses of U.S. citizens from the Philippines must wait an average of seven years. Siblings from the Philippines must wait over 13 years. *See* HING, *supra* note 55, at 115.

60 The phrase comes from KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

61 *See, e.g.*, United States v. Thind, 261 U.S. 204 (1923); Ozawa v. United States, 260 U.S. 178 (1922). Thind, described by the Court as a Hindu of high caste, was deemed not to be White despite various anthropological accounts that Indians were technically Caucasian. IAN HANEY-LOPEZ, WHITE BY LAW 79-109 (1996). Ozawa, a person of Japanese descent, had lived continuously in the United States for 20 years, had three years of education at the University of California, sent his children to American schools, attended American church, and spoke only English at home. Nonetheless, because he was not White, he could not naturalize. YUJI ICHIOKA, THE ISSEI 210-26 (1988).

62 In fact, the change in U.S. immigration and naturalization law and policy may have less to do with enlightened racial attitudes and more to do with the converging Cold War interests of U.S. foreign policymakers seeking to win the "hearts and minds" of unaligned Third World countries. John Hayakawa Torok, *"Interest Convergence" and the Liberalization of Discriminatory Immigration and Naturalization Laws Affecting Asians, 1943-65, in* CHINESE AMERICA: HISTORY AND PERSPECTIVES 1995, at 1 (1995).

63 *"All persons born* or naturalized *in the United States*, and subject to the jurisdiction thereof, *are citizens of the United States* and of the State wherein they reside." U.S. CONST., amend. XIV, §1 (emphasis added).

64 The argument was that the Chinese, although subject to American law and taxation, were not "subject to the jurisdiction" of the United States as required by the Fourteenth Amendment.

65 169 U.S. 649 (1898). The Court explained that the phrase "subject to the jurisdiction" was intended merely to exclude children of parents in diplomatic service or of soldiers in hostile occupation of the country. *Id.* at 688. It also explained that "[t]o hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States." *Id.* at 694.

Justice Fuller disagreed, and in a rhetorical flourish, added that "the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests . . . ." *Id.* at 731 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893). Justice Harlan, who is widely quoted for advancing a color-blind Constitution in his dissent in Plessy v. Ferguson, 163 U.S. 537 (1896), joined Fuller's dissent.

66 *See* Regan v. King, 48 F. Supp. 222 (N.D. Cal. 1942).

67 *See, e.g.*, Neil A. Lewis, *Bill Seeks to End Automatic Citizenship for All Born in the U.S.*, N.Y. TIMES, Dec. 14, 1995, at A26.

68 *See* Robert Shogan, *Abortion Foes Shred Dole's Tolerance Clause; GOP: Draft Platform Would Also Deny Citizenship to Children Born in United States to Illegal Immigrants*, L.A. TIMES, Aug. 6, 1996, at A1.

69 Lewis, *supra* note 67, at A26.

70 *See, e.g.*, SUCHENG CHAN, THIS BITTERSWEET SOIL: THE CHINESE IN CALIFORNIA AGRICULTURE, 1860-1910, at 51-52, 371-74 (1986); John Wunder, *Anti-Chinese Violence in the American West, 1850-1910, in* LAW FOR THE ELEPHANT, LAW FOR THE BEAVER: ESSAYS IN THE LEGAL HISTORY OF THE NORTH AMERICAN WEST 212 (John McLaren et al. eds., 1992). For an historical overview of racially motivated violence against Chinese, Japanese, Asian Indian, Filipino, and Koreans in the U.S., see Sumi Cho, *Model Minority Mythology and Affirmative Action: Supreme Stereotypes of Asian Americans* 48-56 (June 11, 1996) (unpublished manuscript, on file with authors) [hereinafter Cho, *Model Minority Mythology*].

71 Robert S. Chang, *Toward an Asian Pacific American Legal Scholarship: Critical Race Theory, Post-structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1255 n.55 (1993). Professor Chang notes that this may be a gross underestimate because most incidents were not documented.

72 *See, e.g.*, Charles J. McClain & Laurene W. McClain, *The Chinese Contribution to the Development of American Law, in* ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943, at 3 (Sucheng Chan ed., 1991); Charles J. McClain Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529 (1984).

73 For instance, California's anti-miscegenation law was not repealed until 1948. *See* HYUNG-CHAN KIM, DICTIONARY OF ASIAN PACIFIC AMERICAN HISTORY 137 (1986). The Supreme Court struck down all anti-miscegenation laws as unconstitutional in Loving v. Virginia, 388 U.S. 1 (1967).

74 *See* Gong Lum v. Rice, 275 U.S. 78 (1927) (affirming federal constitutionality of Mississippi constitutional requirement of separate schools for Whites and "colored races").

75 *See, e.g.*, People v. Hall, 4 Cal. 399 (1854). This de jure disability was removed by the 1870 federal Civil Rights Act.

76 This led to the famous Supreme Court decision in Yick Wo v. Hopkins, 118 U.S. 356 (1886), which is commonly cited for the propositions that the Equal Protection Clause of the 14th Amendment protects all persons, not just citizens, and that uneven enforcement of a facially neutral law may amount to an equal protection violation.

77 *See* Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (striking down the California law).

78 *See, e.g.*, Terrace v. Thompson, 263 U.S. 197 (1923) (upholding alien land laws in Washington); Porterfield v. Webb, 263 U.S. 225 (1923) (upholding alien land laws in California).

79 *See Takahashi*, 334 U.S. at 413; Oyama v. California, 332 U.S. 633 (1948).

80 *See* Fujii v. California, 242 P.2d 617 (1952).

81 Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2106 n.* (1995) (interim edition).

82 *See* TAKAKI, *supra* note 56, at 15.

83 CAREY MCWILLIAMS, PREJUDICE; JAPANESE-AMERICANS: SYMBOL OF RACIAL INTOLERANCE 251 (1944).

84 Korematsu v. United States, 323 U.S. 214 , 215 (1944).

85 *See* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 202-03, 280-89, 293, 303-05 (1983); Eric K. Yamamoto, *Korematsu Revisited Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1, 10-19 (1986) .

86 *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

87 Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984)

88 *Id.* at 1416-17 (N.D. Cal. 1984) (quoting COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982)) (granting Fred Korematsu's writ of coram nobis and setting aside his criminal conviction).

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89 ROGER DANIELS, CONCENTRATION CAMPS; NORTH AMERICA: JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II, at xvi (1981).

90 *See* Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 238 n.65 (1995) (listing representative articles about the model minority myth).

91 For example, House Speaker Newt Gingrich stated that "Asian Americans are facing a very real danger of being discriminated against because they are becoming overrepresented at prestigious universities that have affirmative action plans." Clarence Page, *Asian Americans in Middle of California Controversy*, OREGONIAN, May 24, 1995, at D7. California Governor Pete Wilson declared in a CNN interview, "Twenty years ago if a more qualified African American student was denied a position in a college class because of his or her skin we called it discrimination and rightly condemned, but now Caucasians and Asian Americans are being discriminated against in the name of affirmative action." CNN television broadcast, May 1, 1996.

92 *See* TAKAKI, *supra* note 56, at 475; Diane Crispell, *Family Ties Are a Boon for Asian-Americans*, WALL ST. J., Sept. 28, 1992, at B1.

93 TAKAKI, *supra* note 56, at 475.

94 *See* SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 168 (1991).

95 One final problem common to such research analyzing 1970 and 1980 census data is that income comparisons typically fail to hold educational levels constant. As a result, APA income is misleadingly high since APAs on the average have more years of schooling than the average American. *See* TAKAKI, *supra* note 56, at 475-76. Controlling 1970 and 1980 census income data for educational levels, non-Hispanic White Americans have higher incomes than APAs. In other words, in order to achieve equality, APAs must overinvest in education or other forms of human capital. *Id.* at 475-76 n.6 (citing research by Amado Cabezas, Gary Kawaguchi, and Larry H. Shinagawa). As Cabezas and Kawaguchi have shown, in order to earn an income comparable to White men, Japanese American men acquired more education and worked longer hours. Males from other APA ethnic groups do not match the income level of their White counterparts when human capital investments are controlled. Korean American men earned only 82% of White men's income, Chinese American men 68%, and Filipino men 62%. *Id.*

96 *See infra* part III.C.

97 Data from 1989 to 1991 reflect that 48% of APA males between ages 25 and 64 have four or more years of college education, compared to 29% of White males in the same age bracket. For females, the percentages are 38 for APAs and 23 for Whites. *See* Paul Ong & Suzanna J. Hee, *Work Issues Facing Asian Pacific Americans: Labor Policy, in* THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020, at 141, 144 (1993) [hereinafter Ong & Hee, *Work Issues*].

98 HING, *supra* note 55, at 198 app. *See also* Ong & Hee, *Work Issues*, *supra* note 97, at 145. At the same time, the Immigration and Reform Act of 1965 granted U.S. labor unions the ability to approve or disapprove preferences according to the supply of blue-collar labor, thereby limiting working-class immigrants. Thus, after 1965, the combined preference for technicians and professionals and limitations on blue-collar immigrants served to increase the proportion of South and East Asian immigrants from middle and upper-middle class families. These professional class Asian immigrants were a marked departure from the largely working-class immigrants from China, India, Japan, Korea, and the Philippines prior to 1965.

99 This preference was modified in 1976 to require a job offer from an employer prior to immigration. Nevertheless, the remaining family reunification preferences continued the disproportionate representation of the educated class by allowing educated Asians who had already immigrated to sponsor their often highly educated relatives. Bill Ong Hing, *Making and Remaking Asian Pacific America: Immigration Policy, in* THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020, at 127, 131 (1993).

100 L. Ling-chi Wang, *Trends in Admissions for Asian Americans in Colleges and Universities: Higher Education Policy, in* THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020, at 49, 52 (1993).

101 Stanley Sue & Sumie Okazaki, *Asian American Educational Achievements: A Phenomenon in Search of an Explanation, in* THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE 139 (Don T.

Nakanishi & Tina Y. Nishida eds., 1995) ("To the extent that mobility is limited in non-educational avenues, education becomes increasingly salient as a means of mobility. That is, education is increasingly functional as a means for mobility when other avenues are blocked.")

102 As Professors Sue and Okazaki have recognized, one must then investigate why other minority groups have not adopted the same attitude toward overinvestment in education. *See id.* at 141. Tentatively, they suggest that different groups may develop different folk wisdoms about success. And although all people of color may share abstract beliefs in the value of education, APAs seem to hold a more concrete belief that "success in life has to do with the things studied in school." *Id.* at 142.

103 For instance, different Asian ethnic groups have markedly different average incomes. Paul Ong & Suzanne J. Hee, *Economic Diversity, in* THE STATE OF ASIAN PACIFIC AMERICA: ECONOMIC DIVERSITY, ISSUES AND POLICIES 31-56 (Paul Ong ed., 1994) [hereinafter Ong & Hee, *Economic Diversity*]; HING, *supra* note 55, at 135-38, 171-74.

104 One 1869 newspaper editorial complained, "Chinaman can live where stronger than he would starve. Give him fair play and this quality enables him to drive out stronger races." ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850, at 40 (1988).

105 William Petersen, *Success Story: Japanese-American Style*, N.Y. TIMES, Jan. 9, 1966 (Magazine), at 20, 20-21.

106 In *The Bell Curve*, authors Charles Murray and Richard Herrnstein revive the notion that African Americans are inherently intellectually inferior to Whites and Asians:

> Despite the forbidding air that envelops the topic, ethnic differences in cognitive ability are neither surprising nor in doubt. Large human populations differ in many ways, both culturally and biologically. It is not surprising that they might differ at least slightly in their cognitive characteristics. . . . East Asian (e.g., Chinese, Japanese) whether in America or Asia, typically earn higher scores on intelligence and achievement tests than White Americans . . . . The average White person tests higher than about 84 percent of the population of Blacks . . . .

HERRNSTEIN & MURRAY, *supra* note 8, at 269-70.

107 *See* DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 24 (1995) (identifying "the main contemporary obstacle facing African Americans [as their] destructive and pathological cultural patterns of behavior").

108 Mari Matsuda, *We Will Not Be Used*, 1 UCLA ASIAN AM. PAC. ISLANDS L.J. 79, 80-81 (1994).

109 *See supra* III.A.

110 Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1361 (1991). Professor Matsuda has reminded us that every person speaks with an accent. She also reports sociolinguistic research that reveals "comprehension is as much a function of attitude as it is of variability." *Id.* at 1362.

111 Cynthia K. Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN'S L.J. 165, 175 (1995) (quoting Sen. D'Amato) (emphasis added).

112 "Senator Ernest Hollings of South Carolina suggested that a factory's employees 'draw a mushroom cloud and put underneath it: Made in America by lazy and illiterate workers and tested in Japan.'" Jerry Kang, Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1940-41 (1993).

113 *See* Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 46-53 (1994).

114 For example, he was one of the youngest elected delegates to the 1978 Hawaii State Constitutional Convention.

115 *See* Lee, *supra* note 111, at 186.

116 Telephone Interview with Bruce Yamashita (Sept. 9, 1996).

117 Pursuant to Executive Order 11246, the first federal affirmative action policy, the Office of Federal Contract Compliance Programs was created to monitor affirmative action compliance by those institutions receiving federal grants and contracts. An "underutilization analysis" was developed to determine when units or institutions hired below the parity rate in light of the available pool of minority applicants.

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118 438 U.S. 265 (1978). In the highly divided *Bakke* opinion, Justice Powell was able to eke out a narrow plurality for the striking of the Davis plan as a quota and the approval of the use of race in admissions as a "plus" factor to further the compelling interest of "diversity." *See id.* at 313-14. Moreover, as Professor Foster suggests, "the diversity concept originated in *Bakke*, was further developed in *Metro Broadcasting*, and has since been increasingly invoked in societal discourse because of the legitimacy lent to the concept in those cases." Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of 'Diversity,'* 1993 WIS. L. REV. 105, 111 (1993).

More recently, the future of the diversity rationale has been put in question. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996). For a brief analysis of *Hopwood* as precedent, see *supra* note 51. *See also* Donald L. Beschle, *"You've Got to Be Carefully Taught: Justifying Affirmative Action After* Croson *and* Adarand, 74 N.C. L. REV. 1141, 1152-53 (1996) (contending that Powell's forward-looking rationale in *Bakke* lost ground in subsequent cases that focused on the existence of past guilt to justify affirmative action).

119 Professor Chin argues that the vagueness that inheres in the diversity standard accompanied by academia's loose application of *Bakkean* affirmative action requirements currently jeopardizes the future viability of *Bakke* and diversity-based affirmative action before the Rehnquist Supreme Court. Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 890-911, 924-30 (1996).

120 Unfortunately, the general decline of "racial discrimination" from the public discourse in favor of the less controversial goal of "diversity" was consistent with a variety of reactionary explanations for the under-parity representation of various groups of color in society's institutions, ranging from those of *The Bell Curve* variety that resurrected long discredited notions of biological inferiority, *see supra* note 106, to model minority paradigms that posit the cultural inferiority of non-model minority groups.

121 LINDA J. ZIMBLER, NATIONAL CENTER FOR EDUCATIONAL STATISTICS, U.S. DEP'T OF EDUC., FACULTY AND INSTRUCTIONAL STAFF: WHO ARE THEY AND WHAT DO THEY DO? 7, 14-15 (1994). The underrepresentation in these fields is particularly troubling given the importance of these research areas to community issues and formation. Some may argue that such categorical concentrations represent free choice or cultural priorities of APAs as a group as opposed to exclusionary practices. This analysis begs the question by failing to see that exclusionary practices or stereotyping may shape cultural priorities of a group or individual. For example, if English departments are reluctant to hire APA literature professors based on prevalent stereotypes of poor language and communication skills, then APAs considering doctoral programs will rationally forego pursuing Ph.D.s in English, which in turn, reinforces the problem. While exercising their "free choice," individuals can certainly be expected to respond to the effects of racial and cultural stereotyping.

More research and data collection needs to be conducted to measure the extent to which external factors influence career decisions. Some qualitative research and anecdotal evidence confirm the presence of entry barriers for APA faculty in non-stereotypical fields and disciplinary tracking prior to the Ph.D. stage. Ironically, however, the perceived success of APAs in higher education renders consistent research and useful data collection by monitoring agencies the exception, not the rule.

122 ZIMBLER, *supra* note 121, at 15, table 6 (reporting statistics for full-time faculty with any instructional responsibilities by race/ethnicity for Fall of 1992). For recent data on law school hiring, see Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law School Faculty*, 3 ASIAN L.J. (forthcoming 1996).

123 DEBORAH CARTER & REGINALD WILSON, TENTH ANNUAL REPORT ON MINORITIES IN HIGHER EDUCATION 29 (AMERICAN COUNCIL ON EDUCATION 1991) (noting that APAs were only 1.4% of all higher education administrators in 1989, while constituting 4.7% of all full-time faculty).

124 *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). In *Wards Cove*, despite segregated conditions described in the dissent as a "plantation," the Supreme Court found that the categorical concentration of predominantly APA workforce in the low-skill jobs and their underrepresentation in management or skilled jobs did not constitute employment discrimination. To add insult to injury, when Congress overruled the Court's elevated standard of proof for employment discrimination cases in the Civil Rights Act of 1991, both Houses approved a special exemption for the Wards Cove em-

ployers, thereby denying relief under the act triggered by the APA and Alaska Native Wards Cove plaintiffs.

125 ASIAN PACIFIC AMERICANS FOR AFFIRMATIVE ACTION, WE WON'T GO BACK!: WHY ASIAN PACIFIC AMERICANS SHOULD SUPPORT AFFIRMATIVE ACTION 8 (1996) (on file with authors).

126 CHINESE FOR AFFIRMATIVE ACTION, THE BROKEN LADDER '92: ASIAN AMERICANS IN CITY GOVERNMENT 5 (1992).

127 *Id.*

128 *Id.*

129 *Id.* at 11.

130 For example, APA women face unique problems such as racialized sexual harassment that goes unaddressed by parity measurements. APA women are particularly susceptible to these types of workplace discrimination. For a more in-depth treatment of Asian Pacific American women and sexual harassment, see Sumi Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, *in* ADRIEN WING, CRITICAL RACE FEMINISM (forthcoming 1997). *See also* University of Pennsylvania v. EEOC, 493 U.S. 182 (S. D. Iowa 1990); Jew v. University of Iowa, 749 F. Supp. 946 (1990); Paul v. Stanford University, 1986 WL 614 (N.D. Cal.); Martha Chamallas, *Jean Jew's Case: Resisting Sexual Harassment in the Academy*, 6 YALE J. L. FEM. 71 (1994); Tape of Forum, Asian Pacific Americans Fighting Back (October 1991) (on file with author). The cases of Jean Jew at the University of Iowa, Rosalie Tung at the University of Pennsylvania, and Diane Yoshikawa Paul at Stanford reveal an appalling manifestation of racial and sexual harassment that may represent only the tip of the iceberg.

131 *See generally* TAKAGI, *supra* note 5. Takagi explores admissions controversies in the mid-1980s for APA students at elite universities such as UC Berkeley, UCLA, Brown, Harvard, Princeton, and Stanford. APA applicants and community leaders voiced concern over admissions rates that were lower than that of White applicants, despite having generally stronger median levels of educational achievement. *See id.* at 23, 59. "'Not only, then, are Asians being admitted overall at rates lower than Whites, but the very categories that seem to provide large advantages for Whites are not terribly consequential for Asians. Going to a prep school almost doubles the chances that a white applicant will be admitted, while the Asian applicant's chances actually decline.'" *Id.* at 30-31 (quoting David Karen, Who Gets in to Harvard: Selection and Exclusion at an Elite College 318 (1985) (unpublished dissertation, Harvard University)).

132 *See generally* Eugenia Escueta & Eileen O'Brien, Asian Americans in Higher Education: Trends and Issues, American Council of Education Research Briefs Series, Vol. 2, No. 4, (1991); Sumi Cho, *Confronting the Myths: The State of Asian American Academic Employment; Proceedings of 10th Annual Asian Pacific Americans in Higher Education Conference* (forthcoming 1996); Yen, *supra* note 122.

133 Eugenia Escueta & Eileen O'Brien, *Asian Americans in Higher Education: Trends and Issues*, *in* THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE 259, 267 (Don T. Nakanishi & Tina Yamano Nishida eds., 1995).

134 CHINESE FOR AFFIRMATIVE ACTION, THE BROKEN LADDER '92: ASIAN AMERICANS IN CITY GOVERNMENT 5 (1992).

135 One definition of "glass ceiling" discrimination is forwarded by Bettina Plevan, Chair of the 1992 Committee on Women in the Profession of the Association of the Bar of the City of New York: "The glass ceiling refers to the transparent but very real barrier between middle management and its professional equivalent and the more elusive realm of success at the top of the ladder . . . ." Cynthia F. Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 306, 306 (1995). For a discussion of how the glass ceiling operates against APA scientists and engineers, see Paul Ong & Evelyn Blumenberg, *Scientists and Engineers*, *in* THE STATE OF ASIAN PACIFIC AMERICA: ECONOMIC DIVERSITY, ISSUES AND POLICIES 165-89 (Paul Ong ed., 1994).

136 Escueta & O'Brien, *supra* note 132, at 8. This means that APAs as a group also have the largest proportion of untenured, tenure-track faculty. Various unfair tenure and promotion practices serve the same purpose as earlier practices that excluded APAs from unions and occupational sectors, namely the preservation of White property interests in the best jobs and positions of privilege within occupations. Ironically, model minor-

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ity stereotypes may trigger academic jealousy and fears of unfair competition that isolate APAs from established (and voting) colleagues as well as from junior faculty. Often, such fears of Asian superiority are compensated by negative model minority ascriptions of deficits in such intangible categories as "presence," "self-confidence," or "collegiality" that are then used to deny APA candidates promotion or tenure.

137 *Id.* (citing Equal Employment Opportunity Commission, Higher Education Staff Survey, 1989 EEO-6 Detail Summary Report (unpublished data, 1991)).

138 Historical discrimination and contemporary problems provide the unifying social conditions for construction of a pan-ethnic "Asian Pacific American" identity. While it makes historical sense to aggregate the experiences of Americans of Chinese, Japanese, Korean, Filipino, Asian Indian, Vietnamese, Cambodian, and others of ethnic Asian Pacific descent to discuss an APA history of discrimination, it is dangerous to aggregate all APA groups in a contemporary "Horatio Alger"-like American success narrative. In fact, there are wide disparities in the socioeconomic status among various Asian subgroups. Ong & Hee, *Economic Diversity*, *supra* note 103, at 31-56.

139 Herbert Barringer et al., *Education, Occupational Prestige, and Income of Asian Americans*, 63 Soc. of Educ. 27, 29 (1990).

140 Carter & Wilson, *supra* note 123, at 22, 24-25, 27-28. The authors report that in 1989, the full-time male to female faculty percentages by racial minority group were as follows:

PERCENTAGE OF FULL-TIME FACULTY (1989)	MEN	WOMEN
African American	53%	47%
Latina/o	67%	33%
American Indian	66%	34%
APA*	79%	21%

* Note that ACE statistics use the term Asian American regardless of U.S. citizenship, and therefore includes both citizens and noncitizens. *See also* Escueta & O'Brien, *supra* note 132, at 8.

This American Council of Education ("ACE") study also revealed that in 1989, women earned only 29% of APA Ph.D.s compared to 43% of all women earning doctorates in the general population. Furthermore, while APAs as a group have the lowest tenure rate of all groups at 41%, APA women suffer an even lower rate of 31%. Categorical concentrations also differ widely according to gender. As mentioned above, engineering has the highest concentration of APA faculty. Almost 17% of all APA men employed in higher education work in this field. However, only 1.1% of APA women are employed as faculty in engineering departments. APA men are 4% of all full-time faculty, but have higher percentage representations in computer sciences (10%), natural sciences (7%), and first-professional disciplines (7%). By contrast, the only over-parity representation of APA women exists in the field of foreign languages and area studies.

141 *See generally* U.S. Civ. Rts. Comm'n Rep., Civil Rights Issues Facing Asian Americans in the 1990's (1992) [hereinafter Civil Rights Issues]; Oversight Hearing Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 100th Cong., 1st Sess. (1987). *See also* Chang, *supra* note 71, at 1252-55; Kang, *supra* note 112.

142 *See* Civil Rights Issues, *supra* note 141, at 46-47.

143 Kang, Note, *supra* note 112, at 1928.

144 John Hayakawa Torok, Committee Against Anti-Asian Violence, Chronology of Bias-Motivated or Related Killings Since 1981 (1993).

145 *Special Circumstance*, AsianWeek, May 10, 1996, at 4.

146 Penalty enhancement statutes provide for harsher penalties for crimes motivated by prejudice against groups.

147 Other examples of anti-Asian violence include: a police detective brutalized Long Guang Huang while falsely arresting him in May 1985; youths fractured the skull and legs of Sing Vang, a Vietnamese refugee, in September 1985; a gang called the "Dotbusters" beat to

death Navroze Mody, an Asian Indian American, in September 1987. In 1989, Jim Loo, a Chinese American, was murdered in a pool room fight in which he was called "gook," "chink," and blamed for the death of American soldiers in Vietnam. The same year, a gunman motivated by racial hatred strafed a schoolyard with an automatic weapon, killing five children of Southeast Asian descent. In 1990, Hung Troung, a fifteen year-old [sic] Vietnamese youth, was killed by two men, said to be skinheads, shouting "white power." While screaming "Karate! Karate!," skinheads in Denver forced six Japanese students to stand in a line and beat them with baseball bats. In the summer of 1992, some of the rioters in Los Angeles deliberately targeted Asian American businesses. A nineteen-year-old Vietnamese American, Luyen Phan Nguyen, was beaten to death at a party while onlookers yelled "Viet Cong."

Kang, Note, *supra* note 112, at 1927 n.11. *See also* Cynthia K. Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. (forthcoming Dec. 1996) (discussing the murder of Yoshihiro Hattori, a foreign exchange student killed in alleged self-defense, and the shooting of Steffan Wong by a neighbor who presumed that Wong, because he was Asian, posed a martial arts threat) (manuscript at 43-56, on file with authors); John Hayakawa Torok, *On the Intersections of Violence Racial Nativism, Law and White Supremacy: An Asian American Perspective* (June 2, 1994) (unpublished manuscript presented at the 5th Annual Critical Race Theory workshop, on file with authors). Torok catalogs the following: A white public school teacher pushed 19-year old Ly Yung Cheung to her death in front of a New York city subway train in 1984. He believed that he was pursued by Asian demons and stated, "Now we're even" as she died. Jean Har-Kar Fewel, an 8-year old orphan and native of Hong Kong was found raped, murdered, and left hanging from a tree in North Carolina. In the apartment of the man arrested for her murder, police found a copy of a Penthouse magazine that included a photopictorial that eroticized the torture, bondage, killing, and hanging of young Japanese women. Paul Him Chow was bludgeoned to death in Greenwich Village in 1988, his face and head beyond recognition. Police refused to classify the attack as bias-related despite their determination that there were at least four attackers and the victim's prior complaints of harassment for being gay and Asian in the same area.

148 *See generally* NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, 1995 AUDIT OF VIOLENCE AGAINST ASIAN PACIFIC AMERICANS: THE CONSEQUENCE OF INTOLERANCE IN AMERICA (1996).

149 *See, e.g.*, Carol Innert, *College Admission Study Finds Asian-Americans Have a Gripe*, WASH. TIMES, Dec. 16, 1995, at A5; *Living by the Numbers: Has the Time Come to Abolish Affirmative Action? An Interview with the Two Sponsors of What Has Been Called 'the Angry White Men's Initiative,'* S.F. CHRON., Feb. 12, 1995, at Zone 1 (Sunday).

150 *See* Kang, *Negative Action*, *supra* note 25, at 2 n.4.

151 *See* Cho, *Model Minority Mythology*, *supra* note 70.

152 Jerome Karabel & David Karen, *Go to Harvard; Give Your Kid a Break*, N.Y. TIMES, Dec. 8, 1990, at 25; Karen De Witt, *Harvard Cleared in Inquiry of Bias*, N.Y. TIMES, Oct. 7, 1990, §1, at 35; Letter from Thomas J. Hibino, Acting Regional Director, Office for Civil Rights, U.S. Department of Education, to Derek Bok, President, Harvard University (Oct. 4, 1990) (on file with the authors).

153 This sort of treatment is called "neutral action," in contrast to both "affirmative action" and "negative action." *See supra* III.D.1, ¶3.

154 For example, during the Reagan administration, the Office of Federal Contract Compliance Programs, charged with enforcing Title VII anti-discrimination laws for public employers, suffered severe budget cuts that slashed personnel more than 50% between 1979 and 1985. M.V. Lee Badgett & Heidi I. Hartman, *The Effectiveness of Equal Employment Opportunity Policies*, *in* ECONOMIC PERSPECTIVES ON AFFIRMATIVE ACTION 57, 63 (Margaret C. Simms ed., 1995). Badgett and Hartman note a similar phenomenon of declining federal enforcement of anti-discrimination laws under the Equal Employment Opportunity Commission during the Reagan years. *Id. See also* Jennifer Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1436-37 (1995) (observing that "[u]nder the Reagan administration, there was no serious enforcement against civil rights valuations by schools, colleges, or job training institutions. Instead, civil rights agencies slashed data collection, investigations, and public release of information .... Although the laws were still on the books, the basic attitude was to minimize enforcement.").

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155 Sumi Cho, A Theory of Racial Mascotting, Remarks at the First Annual Asian Pacific American Law Professors Conference (Oct. 14, 1994) (discussing how APAs have been relegated to the role of a "racial mascot" for conservatives in contemporary political battles).

156 Eric Yamamoto forwards the concept of "simultaneity" to convey that APAs as a group are not simply subjugated by Whites or manipulated by Whites as a "model minority," but also exercise agency to oppress African Americans and Latina/os. For example, APAs may be discriminated against by Whites (ceilings on Asian admissions at elite schools); be manipulated by Whites (forwarded by affirmative action opponents as the true victims); and simultaneously be perpetrators of oppression (by opposing affirmative action when it does not serve their immediate interests). Professor Yamamoto advocates "interracial justice," a basic commitment to anti-subordination among groups of color. Eric Yamamoto, *Rethinking Alliances: Agency, Responsibility, and Interracial Justice*, 3 UCLA ASIAN PAC. AM. L.J. (forthcoming Oct. 1996).

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